DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT

ALERT

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IN THIS ISSUE

THE COMMON GOOD OF THE ENTERPRISE IS NOT A RELEVANT FACTOR IN DETERMINING WHETHER A DEMAND CONSTITUTES A MATTER OF MUTUAL INTEREST

Vanachem Vanadium Products (PTY) Ltd v National Union of Metalworkers of SA (J 658/14) settles the issue.

In an urgent application, Vanachem Vanadium Products (Pty) Ltd (Applicant) sought to interdict the National Union of Metalworkers SA (Union) from embarking on strike action.

The Applicant alleged that the demands submitted by the Union were 'unfair and unreasonable' as the dispute was regulated by the Metal & Engineering Industries Bargaining Council's (MEIBC) main agreement and a strike settlement agreement concluded between the Applicant and the Union in December 2012 (agreements). The applicant contended that the Unions demands were governed by the agreements and consequently could not form the subject matter of a strike.

In the alternative, the Applicant submitted that the subject of the Unions demands did not constitute 'matters of mutual interest' for the purposes of the definition of a 'strike', as set out in s213 of the Labour Relations Act, No 66 of 1995 (LRA).

The Union's demands were set out as follows:

- the insourcing of jobs previously outsourced by the Applicant;
- the provision of transport to employees to and from work free of charge;
- the appointment of one full-time shop steward and one full-time health and safety steward as well as 30 days' time off per shop steward per annum with unlimited time off for trade union office bearers;
- payment of risk allowances, namely heat, chemical and dust allowances; and
- an obligation on the Applicant to train a minimum of five artisans per term.

In finding that all of the Union's demands, apart from the provision of transport to employees were lawful and thus 'matters of mutual interest', Judge Van Niekerk assessed the history of the phrase 'matters of mutual interest', pronouncing that in its current form, the phrase is employed to "ultimately define the scope of collective bargaining under the LRA, the statutory dispute resolution system, and the scope of legitimate industrial action."

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An interesting part of the matter concerned the Applicants' submission that for a matter to be a matter of mutual interest, it must amongst other things, "be a matter in the interest of both the employer and employee, and must concern the common good of the enterprise."

Judge Van Niekerk found the Applicants' proposition on this point to be fundamentally flawed for the following reasons:

- 'matters of mutual interest' serve to distinguish those disputes that concern the socio-economic interests of workers and those that might be termed purely political disputes from disputes that concern the employment relationship;
- as preference must always be given to an interpretation which gives effect to the Bill of Rights and the purposes of the LRA, the correct interpretation of 'matters of mutual interest' would exclude those matters that are purely political in nature, or which concern the socio-economic interests of workers; and
- by extrapolating the term 'common good' into the term 'matters of mutual interest', every demand made by a trade union in the collective bargaining process would be subject to utilitarian analyses (what would constitute the greatest good for the greatest number). This would be in conflict with South Africa's voluntarist system, as it would empower courts to evaluate the merits of a demand and make any value judgment as to whether a demand promotes or secures the common good of an enterprise. This would unjustifiably widen the scope of a courts power, as its function is to determine the lawfulness of demands in the strict sense, and make no judgment as to their merits or consequences.

This judgment clarifies a commonly mistaken belief amongst employers and Trade Unions alike. Although the position may vary as leave to appeal has been granted, the scope of the phrase 'matters of mutual interest' is currently such that the interests of the enterprise are irrelevant.

Fiona Leppan and Benjamin Cripps

EMPLOYERS SHOULD SAFEGUARD THEMSELVES AGAINST THE DIFFICULTIES OF DEFAMATION CLAIMS BROUGHT BY EMPLOYEES

Can an employer be held liable for defamatory statements made about an employee? The High Court recently confirmed that it can but that an employer may rely on the standard defences to such a claim to escape liability.

In *Ramridili v MTN SA Innovate Centre and another (case number 0591/2012: judgment delivered 3 June 2014)* Judge Satchwell confirmed that statements made by a manager about an employee could be actionable where these statements were defamatory. The employee claimed that he was defamed when a manager made allegations about him in an email sent to various senior employees of the defendant company.

The employee lodged various grievances, raised complaints to top management of the company and referred a dispute to The Commission for Conciliation, Mediation and Arbitration (CCMA). He sent emails requesting disciplinary action to be taken against individuals who "… undermined Company policies." When emails were circulated within a portion of the management team regarding his allegations, a manager responded and stated, amongst others, that the employee "… has underlying psychological issues given the number of grievances and endless complaints both inside and outside of [the company]."

The High Court held that saying that the employee had 'underlying psychological issues' suggested that the employee was "… unable to control his choices or interactions with others because of the psyche which underpin his behaviour." Such a perception does not bode well for an employee in an environment where teamwork is valued and deviation from the norm not desirable. Management of the company may well be influenced by the manager's assessment of the employee. Judge Satchwell held that the words used were defamatory of the employee.

The judge stated further that, by effectively labelling the employee's uncomfortable behaviour as illness, it had an impact upon the recipients of the email. The manager the further told a meeting of selected senior managers that the employee had "… psychological tendencies towards paranoia." The judge rejected the defence proffered that the email was sent with the intention of assisting the employee to overcome what appeared to be psychological issues. On the

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facts, she held that the subsequent emails directed to procure counselling for the employee was aimed at the upcoming disciplinary enquiry (and not following on the defamatory email previously sent). The judge expressed some sympathy for the manager, though, in stating that she does not see any malice in his actions, only exasperation.

Turning to the common defences against a claim for defamation, the judge confirmed that the manager cannot claim that the defamatory statement was 'true and in the public interest' as he was not qualified to diagnose whether the employee was paranoid or had psychological issues. Turning to the alternative defence raised, she considered whether the statements were 'fair comment and in the public interest'.

For this defence to succeed, the defendant had to prove that the comment was fair based on the facts expressly stated. The facts need not be proven to be true, but must be 'substantially true'. The court considered the comments made to be fair comment as some of the facts stated by the manager in the email were either conceded by the employee or not in dispute.

In relation to the public interest leg of this defence, the court stated that public interest does not only refer to the interest of the wider society and statements or activities of public figures. The defendant is a large organisation with operations in South Africa, the rest of the continent, the Middle East and Europe with millions of customers. All stakeholders have an interest in the wellbeing of the organisation and need to be assured that their interactions with the company and its employees are safe. The court held that the human resources manager is entitled (and even required) to comment on the psychological wellbeing of an employee where this has been questioned by the executives.

The court thus dismissed the employee's claim and awarded costs against him.

Employers should take care to ensure that employees are not defamed during communication involving the employees. Care should be taken during disciplinary processes where adverse comments are often made about employees. Unless a manager is qualified to make assessments about an employee, feedback about employee behaviour should be crafted in such a manner that it is not defamatory or that the employer could rely on the defences of truth/fair comment and public interest.

Employers don't enjoy special protection against claims of defamation. However, as this case again shows, succeeding with such a claim is often difficult in practice for disgruntled employees. The negligible amounts awarded in successful claims and risk of an adverse cost order in unsuccessful claims act as natural deterrents to potential litigants. By making managers aware of the risk of defamation and providing training on how to avoid the pitfalls, employers could safeguard themselves against the difficulties of defamation claims brought by employees.

Johan Botes

REDUNDANCY IN ZAMBIAN LABOUR LAW

The Employment Act (Chapter 268 of the Laws of Zambia) is the principal piece of legislation governing employee rights in Zambia. A distinction is drawn between oral contracts of service, which are governed by Part IV of the Employment Act, and written contracts of service, which are governed by Part V.

The Employment Act

Section 26B of Part IV (oral contracts) defines the concept of redundancy and confers rights on employees who are terminated by reason of redundancy. However, Part V of the Employment Act (written contracts) lacks a corresponding provision and is therefore entirely silent on redundancy.

The Supreme Court of Zambia (SCZ) in *Barclays Bank Plc v Zambia Union of Financial Institutions and Allied Workers (Judgment No 12 of 2007)* held that s26B of the Employment Act does not apply to written contracts on the basis that –"[i]n enacting this provision Parliament intended to safeguard the interests of employees who are employed on oral contracts of service which by nature would not have any provision for termination by way of redundancy." The SCZ reaffirmed its view in *Chilanga Cement, Plc v Kasote Singogo (Judgment No 13 of 2009)*.

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Orders in terms of the Minimum Wages and Conditions of Employment Act

Orders have been issued under the Minimum Wages and Conditions of Employment Act (Chapter 276 of the Laws of Zambia) to provide for redundancy benefits for certain occupations.

The Minimum Wages and Conditions of Employment (General) Order, (Statutory Instrument, No 2 of 2011) (General Order) provides that where an employee's contract of service is terminated by reason of redundancy, the employee shall be entitled to at least one month's notice and redundancy benefits of not less than two months' basic pay. However, the application of the General Order is limited to the following occupations:

- general worker;
- cleaner;
- handy person;
- office orderly;
- guard;
- driver;
- typist;
- receptionist;
- telephonist; and
- qualified clerk.

The scope of the General Order is further limited by the exclusion of employees of the Republic of Zambia, employees of local authorities, employees in management positions, employees engaged in domestic service and employees in any occupation where wages and conditions of employment are regulated by collective bargaining.

The Minimum Wages and Conditions of Employment (Shop Workers) Order, (Statutory Instrument, No 1 of 2011, as amended by Statutory Instrument, No 47 of 2012) (Shop Workers' Order) provides that employees in other specified occupations are entitled to at least one month's notice and redundancy benefits of not less than two months' basic pay. The list of included occupations is too long to list in this article; however, most of the included occupations pertain to the retail sector and the Shop Worker's Order, like the General Order, contains a long list of excluded occupations.

Employees with written contracts have no general entitlement to redundancy benefits, but certain occupations qualify for redundancy benefits under the General Order and the Shop Workers' Order. Employers are advised to consult the two Orders for guidance on whether their employees fall within protected occupations.

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