DLA CLIFFE DEKKER HOFMEYR

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SHOULD A CERTIFICATE OF OUTCOME BE REVIEWED?

There have been a number of cases concerning the status of the certificate of outcome issued by the Commission for Conciliation Mediation and Arbitration (CCMA) as well as the power of the CCMA to determine its own jurisdiction.

Section 135 of the Labour Relations Act, No 66 of 1995 (LRA) states that when conciliation has failed or at the end of a thirty (30) day period provided for conciliation, or any further period agreed between the parties, the presiding Commissioner must issue a certificate stating whether or not the dispute has been resolved.

Rule 14 of the CCMA Rules states that during the arbitration proceedings, if it appears that a jurisdictional issue has not been determined by the CCMA at conciliation the referring party is required to prove that the CCMA has jurisdiction.

In the case of *Bombardier Transportation (Proprietary) Limited v Mtiya NO & Others (2010) JOL 25366 (LC)*, the Labour Court held that a certificate of outcome has no value save to indicate that the first step in the dispute resolution process, namely conciliation, has been completed. As per the case, the certificate of outcome does not affect whether the CCMA has or does not have jurisdiction to hear a dispute. The Court further indicated that Rule 14 only requires the conciliating Commissioner to give proper consideration to jurisdictional points raised. The conciliating Commissioner thereafter has the election to either determine the jurisdictional question or divert to the Commissioner arbitrating the dispute.

The Court went on to say that if a jurisdictional challenge was heard and upheld prior to the conciliation, the Commissioner's ruling puts an end to the dispute. It would therefore not be necessary for a Commissioner to issue a certificate of outcome. The jurisdictional ruling stands until it is reviewed and set aside by the Court. The Court held that a Commissioner issues a certificate of outcome in terms of s135(5) because conciliation has failed and not because a jurisdictional challenge has been deferred if that is the circumstances. It is evident from the case that the opinion with regards to certificates of outcome is that it is merely issued when a dispute has not been resolved because the Commissioner is required to issue the certificate by s135(5).

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The certificate of outcome therefore has no other legal significance and no bearing on the jurisdiction of the CCMA. If a conciliating Commissioner has not made a ruling with regards to jurisdiction then either party has the right to raise a challenge regarding jurisdiction at the arbitration.

In the case of *BMW South Africa (Pty) Ltd v NUMBA on behalf of Members (2012) 3 BLLR 274 (LAC)*, the Labour Appeal Court confirmed what was stated in the Bombardier case. The Labour Appeal Court further indicated that it was not necessary to review and set aside a certificate of outcome.

The recent case of *City of Johannesburg v The South African Local Governing Bargaining Council & Others* handed down by Judge Van Niekerk on 10 February 2014 is the latest judgment in the string of judgments considering the status of a certificate of outcome and jurisdiction rulings from the CCMA.

In the City of Johannesburg case a number of sergeants claimed that they had been demoted due to them being placed on the same salary structure and band level as their subordinates.

At the arbitration proceedings the City of Johannesburg submitted that the Bargaining Council lacked jurisdiction to entertain the dispute due to the fact that the sergeants had referred the matter outside of the time limits prescribed by s191(b)(2) of the LRA.

The arbitrator relied on the view that a party is not entitled to raise preliminary points at an arbitration proceeding unless the certificate of outcome had been taken on review and thus dismissed the preliminary point.

The dispute had originally arisen in 2001; however the employees had only referred the dispute to the Bargaining Council in February 2010. Judge Van Niekerk relied on the Bombardier and BMW cases stating that "*the existence of a certificate of outcome does not preclude an arbitrator from considering a jurisdictional issue, when a jurisdictional challenge arises at arbitration*".

The Court went on to say that the Commissioner is generally obliged to consider the issue and to satisfy himself that the Council of CCMA has jurisdiction.

Judge Van Niekerk restated that the test which applies to jurisdictional rulings in stating that the test was one of correctness and not reasonableness. The Council either had jurisdiction or it did not.

The Judge relied on various other case law and stated that an arbitrator who issues an arbitration award in absence of jurisdiction acts in excess of his powers and the arbitration award is a nullity.

The Court confirmed that it is competent for a party who seeks to review an arbitration award relating to an unfair labour practice or lack of jurisdiction does not need to have the certificate of outcome reviewed and set aside. The Judge held that in the case before him, the referral of the dispute was clearly outside of the time limits required and therefore the arbitrator lacked the jurisdiction to entertain the dispute. The Court held that in absence of any application for condonation for the late referral of the dispute the arbitrator lacked the jurisdiction to consider the dispute.

The case reaffirms that it is trite in our law that:

i. A certificate of outcome does not confer jurisdiction on the CCMA or a Bargaining Council;

ii. A certificate of outcome does not deprive an arbitrator of jurisdiction;

iii. The certificate of outcome represents no more than a recordal of the status of the dispute subsequent to conciliation; and

iv. The review of an arbitration award based on the grounds that the CCMA or Bargaining Council did not have jurisdiction to hear the dispute, is not dependent on the review of the certificate of outcome.

Inez Moosa

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IMPLICATIONS OF THE WITHDRAWAL OF DIRECTIVE NO 43 OF 2010 ON FOREIGNERS WITH PENDING PERMIT APPLICATIONS

As from 28 February 2014, foreign nationals with pending permit applications may be in contravention of the Immigration Act, No 13 of 2002.

On 28 February 2014, the Minister of Home Affairs withdrew Directive No. 43 of 2010 (Directive). The Directive effectively waived penalties incurred by default as a result of awaiting the outcome of pending applications and further allowed foreigners to travel in and out of South Africa on expired temporary residence permits with the original Acknowledgement of Receipt as proof that an application had been submitted and was pending with the Department of Home Affairs. The Directive was issued as a temporary measure to alleviate the restrictions or ill consequences suffered by foreigners adversely affected by the backlog experienced at the Department of Home Affairs.

The withdrawal of Directive only affects the ability to travel on the 'acknowledgement of receipt' received when submitting one's extension application. Consequently, persons who have submitted applications in South Africa will be required to stay and await the outcome of their applications or leave the country before the expiry of their current permits. They are however, before expiry of the permit, entitled to remain in the country but only if an application has been submitted to the Department of Home Affairs prior to 30 days before expiry of the current permit. In this regard, foreigners will not be allowed to travel whilst awaiting the outcome of the application and it must be noted that an administrative fine will be payable if the individual overstays his/her permit conditions.

Foreigners from visa exempt countries will be permitted to travel prior to the expiry of their permits, however upon re-entry they will be granted a visitor's visa, which does not allow the individual to work. Should the foreign national wish to work within South Africa, they must make an application in terms of s11(2) of the Immigration Act. The application will have to be made 10 days prior to re-entry into South Africa. In the event that the foreigner is from a non-visa exempt country, they would not qualify for entry into South Africa should they leave and would have to await the outcome of their permit application prior to travelling.

All entry ports have been advised of the withdrawal of Directive and those who have already left the country prior to the withdrawal will be allowed to re-enter by presenting the acknowledgement of receipt. This, however, will only be possible until 30 April 2014 where after re-entry will result in a fine.

The Minister of Home Affairs was quoted as saying that Directive "encouraged a lethargic approach to adjudication of temporary residence permits". However, it remains to be seen whether the Department of Home Affairs will have the capacity to process and distribute these permits, especially in light of the number of applications made.

In light of the above consequences that foreigners may face should they leave the country, it is strongly recommended that it is best that they remain in South Africa and wait for their permit application to be finalised.

Michael Yeates, Anli Bezuidenhout and Abdul Allie

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BARNARD V SOUTH AFRICAN POLICE SERVICE: "A PECULIARLY SOUTH AFRICAN TALE"

The Supreme Court of Appeal (SCA) recently described the matter of *Solidarity obo Barnard v South African Police Service (165/2013) [2013] ZASCA 177* as a "peculiarly South African tale" as it demonstrated the difficulty of correcting a situation created by a racist past.

Barnard, a police captain, applied twice for vacant posts at the rank of superintendent. Even though she was recommended for both posts she was turned down by the South African Police Service (SAPS) National Commissioner because her promotion would not advance SAPS's equity goals.

Barnard subsequently referred an unfair discrimination dispute to the Labour Court which found in her favour. The aforementioned decision was later overturned by the Labour Appeal Court.

After having considered the Employment Equity Act, No 55 of 1998 (EEA), the SCA noted that even though the SAPS had adopted an equity plan which set demographic targets for the workforce, it nevertheless stated that no employment policy or practice would be adopted if such policy would create an absolute barrier to the advancement of non-designated employees. The aforementioned consideration was substantiated by the fact that instructions issued by the SAPS national office highlighted the need to take both equity and strategic objectives into account and for selection panels to "promote equal opportunities, fair treatment, employment equity and advance service delivery".

In considering the facts, the SCA had regard to *inter alia* the fact that:

i. the posts were not advertised as being reserved for applicants from designated groups;

ii. the employee had scored the highest of the shortlisted candidates for the first post; and

iii. a circular issued by head office encouraged interview panels to appoint officers who would enhance service delivery.

The SCA had regard to both the Constitution and the EEA and stated that the defender of an disputed measure must prove that it was adopted to advance the achievement of equality by protecting or advancing persons disadvantaged by unfair discrimination.

According to the SCA, it is incumbent on the courts to assess the history, nature and purpose of the discriminatory practice as well as the situation of the complainants. The fairness of the discrimination in this case was therefore to be assessed in the light of its impact on the employee.

To the extent that the SAPS had defended its decision on the basis that the employee's promotion would violate the SAPS equity plan, the SCA held that in the light of that plan, as read with the law, it could never be contended that numerical targets are absolute criteria for appointment. Should this be done, it would turn numerical targets into quotas, which are prohibited.

According to the SCA there are no victors or vanquished in matters such as this. It concluded by stating that "For now, ironically, in order to redress past imbalances with affirmative action measures, race has to be taken into account. We should do so fairly and without losing focus and reminding ourselves that the ultimate objective is to ensure a fully inclusive society – one compliant with all facets of our constitutional project."

Accordingly, the appeal was upheld with costs.

Gavin Stansfield and Anli Bezuidenhout

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FINALITY ON THE ISSUE OF ANNUAL LEAVE - USE IT OR LOSE IT

The question recently arose where employees had accumulated excessive annual leave, whether the employer could force its employees to forfeit that excessive leave not taken?

The issue is premised on s20(4) of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) which states that, "An employer must grant annual leave not later than six months after the end of the annual leave cycle".

Furthermore, s20(1) of the BCEA defines 'annual leave cycle' to mean, "the period of 12 months employment with the same employer, immediately following either an employee's commencement of employment or the completion of the employee's prior leave cycle".

On a strict reading of the BCEA, the provision may be interpreted to read that annual leave can only be granted to an employee within the annual leave cycle itself, being 12 months, but not later than 6 months thereafter.

So what happens if an employee does not take their annual leave within this 18 month period?

Up until recently we had received conflicting decisions from the Labour Court.

In the decision of *Jardine v Tongaat-Hulett (2003) 24 ILJ 1147 (LC)* the Labour Court held that annual leave which is not taken within 6 months, after completion of the annual leave cycle, is not automatically forfeited by the employee nor is any right of payment in respect of that leave, upon termination of the employee's employment.

Accordingly, it appeared that employees were able to utilise their accumulated leave entitlement indefinitely and beyond the 18 month period contemplated by the BCEA.

However, a year later the Labour Court said something different in the case of *Jooste v Kohler Packaging (2004) 25 ILJ 121 (LC)*. This time the Labour Court interpreted the BCEA to only entitle a claim for annual leave in respect of the leave cycle immediately preceding the current and uncompleted leave cycle, as well as for the current and uncompleted leave cycle itself.

The court in the Jooste decision held that to permit payment in respect of prior and further leave cycles would allow both the employer and employee to circumvent the provisions of the BCEA.

As a consequence, employers were faced with one decision providing for the forfeiture of annual leave if the annual leave accrued beyond the 18 (eighteen) month period contemplated by s20(4) of the BCEA, and another decision prohibiting such forfeiture.

This conflict was finally resolved in October 2013, *albeit* again by the Labour Court, in the decision of *Ludick v Rural Maintenance (Pty) Ltd (2014) 2 BLLR 178 (LC)*.

The court - in coming to its decision - considered the conflicting decisions previously handed down and in addition to these, was called upon to determine a clause in Ludick's contract, which provided that any annual leave not taken within 30 days of the employers financial year end would lapse.

The court first dealt with the aforementioned clause and in doing so had regard to s5 of the BCEA. This section provides that the BCEA will not be affected by an agreement between the parties and accordingly employers and employees cannot contract out of the provisions of the BCEA.

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Therefore it was found that an employee is entitled to utilise their accumulated leave for a period of 6 months after the annual leave cycle, as provided for in s20(4) of the BCEA and that this period may not be shortened by any agreement between the parties.

In turning to resolve the two conflicting decisions, the Labour Court preferred the latter decision of Jooste, more particularly that an employee will only be entitled to the accumulated annual leave which accrues in the previous leave cycle as well as that leave which accrues in the current and uncompleted leave cycle, subject to the 18 month period referred to above.

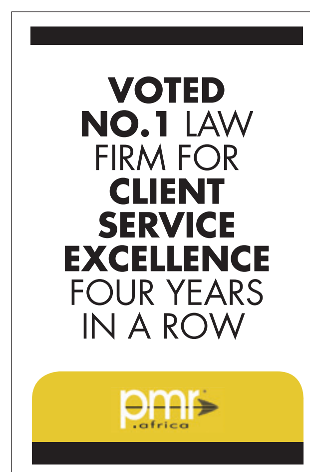
Accordingly, annual leave not taken with the annual leave cycle or within 6 months thereafter, as envisaged by s20(4) of the BCEA, shall be forfeited.

It is noteworthy to mention that this only applies to statutory leave granted to employees in terms of the BCEA, more particularly the statutory minimum of 15 annual leave days.

Any leave in excess of the statutory minimum is deemed to be contractual leave and is not regulated by the BCEA. Accordingly, employers who grant leave over and above the statutory minimum will be well advised to conclude agreements dealing with the utilisation, forfeiture and/or pay-out of such contractual leave, in order to avoid contractual claims being instituted.

Employers should also develop a practice wherein employees are forced to take the annual leave entitlement in the annual leave cycle and at least within the 6 month period thereafter.

Nicholas Preston



DLA CLIFFE DEKKER HOFMEYR

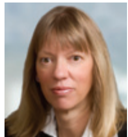
CONTACT US

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

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

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

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



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

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

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

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

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

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

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

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

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

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

Anli Bezuidenhout
Associate
T +27 (0) 21 481 6351
E anli.bezuidenhout@dlacdh.com

Shungu Mariti
Associate
T +27 (0)11 562 1475
E shungu.mariti@dlacdh.com

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

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

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

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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

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