EMPLOYMENT

IN THIS ISSUE

WHEN CAN A PARTY BE HELD LIABLE AS A CO-EMPLOYER?

There has been much speculation over the recent amendments to the Labour Relations Act, No 66 of 1995 (LRA), particularly with regards to how the amendments will be interpreted and applied by the Labour Court. The unreported case of *AMCU v Buffalo Coal Dundee (Pty) Limited* (J593/15) [2015] ZALCJHB 134 (24 April 2015) sheds some light on the newly inserted s200B of the LRA.

Section 200B states the following:

"(1) For the purposes of this Act and any other employment law, 'employer' includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law.

(2) If more than one person is held to be the employer of an employee in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of the employer in terms of this Act or any other employment law."

The facts of the *AMCU* case were as follows: AMCU brought an urgent application against Buffalo Coal and Zinoju Coal (Pty) Limited seeking an order declaring that Buffalo Coal had failed to follow the procedure as required by s189A (13) of the LRA, dealing with large scale retrenchments, as well as s52 of the Mineral Petroleum Resources Development Act, No 49 of 2008 (MPRDA). AMCU further sought an order interdicting Buffalo Coal from issuing termination notices, alternatively, if the notices had already been issued, reinstating the employees.

The organisational structure was such that Buffalo owned a 70% controlling stake in its subsidiary Zinoju. Buffalo Coal conducted the mining operations and Zinoju held the mining rights.

As the holder of the mining rights, Zinoju submitted the Social and Labour Plan (SLP) in terms of s46 of the MPRDA. The SLP made provision for processes relating to retrenchment. The employees' contracts of employment were concluded with Buffalo Coal. AMCU sought to have Buffalo Coal and Zinoju declared as co-employers by means of s200B.

The Labour Court dealt with the liability of employer obligations prior to determining the fairness of the procedure. The court noted that s200B only came into operation on 1 January 2015. Accordingly, the court held that Zinoju could not be held to be the co-employer of the employees because the provision was not retrospective.

The court relied on the case of *Bandat v De Kock* (2015) 36 ILJ 979 (LC) in which it was held that s200B was not retrospective. Support for this argument is found in the wording of s200B, which contains no suggestion of retrospectivity.

Furthermore, the court held that in order for s200B to be triggered there needs to be an intention or an effect to defeat the purposes of the LRA or any other employment law. The court pointed out that the employees did not present a case on this issue. Thus, on this basis too, s200B was not applicable and Zinoju was not held liable as a co-employer.

The court went on to conclude that since Zinoju was not considered as a co-employer in terms of s200B, Zinoju was not required to consult with the employees in terms of the s189 of the LRA.

Inez Moosa

IS THE FAILURE TO LEAD ORAL ARGUMENTS A REVIEWABLE IRREGULARITY?

In the recent decision of *The South African Social Security Agency v NEHAWU and others* (reportable case number C233/14 delivered on 30 April 2015), the Cape Town Labour Court had to decide whether an arbitration award, in which the commissioner based her finding purely on documentary evidence in the absence of a stated case, was reviewable in terms of s145 of the Labour Relations Act, No 66 of 1995 (LRA).

A 'stated case' – also referred to as a 'special case' – is a written statement of facts, agreed to by the parties, so that a judiciary authority can apply the law to the agreed facts. Importantly, the *NEHAWU* decision did not involve a stated case. Rather – as noted in the commissioner's arbitration award – the parties had agreed that no evidence would be led and that the case would be decided on the written submissions and bundles of documentary evidence.

The *NEHAWU* case dealt with the suspension of employees and whether this amounted to an unfair labour practice. The commissioner awarded the sum of R600 to each of the applicants. Although compensation seems minimal, the decision is important because it demonstrates the fundamental role oral evidence plays in labour disputes.

Rabkin-Naiker J failed to comprehend how a dispute which "hinges on the fairness of the conduct of an employer can be decided without the parties giving oral evidence". Referring to the benchmark case of *Gold Field Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration & others (2014) 35 ILJ 943 (LAC)*, Rabkin-Naiker J highlighted the various questions which the Labour Court is required to consider when reviewing an arbitration award:

- "In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employ give the parties a full opportunity to have their say in respect of the dispute?
- Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence).
- Did the arbitrator understand the nature of the dispute he or she was required to arbitrate?
- Did he or she deal with the substantial merits of the dispute?
- Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence"?

The court concluded that the answer to all of the above questions was in the negative. It was accordingly held that the process used by the commissioner in the current matter did not allow for a due and proper arbitration of the dispute as the commissioner based her award solely on the parties' written submissions. In particular, the commissioner's decision turned on the fact that the employer did not reply to the employees' written argument that the suspensions exceeded the 60 days provided for in the employer's own disciplinary code. The arbitration award was thus set aside and the dispute referred back to the CCMA to be heard before a different commissioner.

The important principle to be extracted from this case is that, in the absence of a stated case, oral evidence must be led on the material facts in dispute. Commissioners and arbitrators should not condone an agreement between the parties to lead no oral evidence.

Fiona Leppan and Bryce Bartlett

THE XXI WORLD CONGRESS OF THE INTERNATIONAL SOCIETY FOR LABOUR AND SOCIAL SECURITY LAW IS TAKING PLACE IN CAPE TOWN FROM 15 TO 18 SEPTEMBER 2015, HOSTED BY THE SOUTH AFRICAN SOCIETY FOR LABOUR LAW (SASLAW) AND PROUDLY SPONSORED BY CLIFFE DEKKER HOFMEYR AND DLA PIPER AFRICA.

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