EMPLOYMENT

IN THIS ISSUE

THE EMPLOYMENT SERVICES ACT CAME INTO EFFECT ON 9 AUGUST 2015

The Employment Services Act, No 4 of 2014 (ESA) came into effect on 9 August 2015. The Government Gazette dealing with the commencement of the Act specifically excludes s13 from coming into operation. This section deals with the registration of private employment agencies.

The ESA repeals the Employment Services provisions contained in the Skills Development Act, No 97 of 1998 (SDA). The purpose of ESA is to establish productivity within South Africa, decrease levels of unemployment, and provide for the training of unskilled workers.

While ESA has various mechanisms for improving employment levels in the country and training the workforce, only time will tell if these mechanisms will be successful. We expect regulations to be issued in the near future to provide practice guidelines for the implementation of the ESA.

One of the more publicised provisions of ESA is that it provides for the registration of private employment agencies, which includes recruitment agencies and temporary employment services, more commonly known as labour brokers. As mentioned above though, the provisions relating to this have not yet come into effect.

ESA further provides for the creation of a Public Employment Service, which will be established and managed by the state. The rationale behind the creation of the Public Employment Service is to provide state assistance to unemployed job seekers.

The Public Employment Service will register job seekers and placement opportunities. The aim is then to match job seekers with services and placement opportunities. The Public Employment Service will also provide training for unskilled job seekers and give the unemployed access to career information. Employers in certain industries may be required to register vacancies and specific categories of work with the Public Employment Service. Employers may also be required to interview individuals recommended by the Public Employment Service and pay license fees to assist in funding the Public Employment Service.

ESA is a genuine attempt by the legislature to address unemployment levels. Whether these honourable intentions will prove successful is, as always, dependent on its implementation.

Lauren Salt

ACCESS TO FATAL INQUIRY REPORTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

Section 32 reports under the Occupational Health and Safety Act, 85 of 1993, as amended (OHS Act) will now be more accessible due to the Gauteng High Court's recent judgment *Industrial Health Resource Group & others v the Minister of Labour and others* (7 August 2015).

On 17 April 2009, a workplace fire broke out at the Paarl Print factory in the Cape. Tragically, thirteen people lost their lives. Ten of the thirteen applicants in the landmark case were the casualties' next of kin (Applicants).

The fatal inquiry was presided over by an inspector in terms of s32 of the OHS Act. In accordance with his statutory duties, the inspector heard extensive evidence in the matter and compiled a written report (Report) detailing the causes and circumstances of the accident.

In terms of s32(10) of the OHS Act, the inspector submitted the Report to the Chief Inspector and the National Director of Public Prosecutions (NDPP), the latter of which is tasked with initiating, if deemed necessary, any prosecutions.

The Applicants asked the Chief Inspector to send them a copy of the Report. In response to this request, the Applicants were informed of the blanket policy not to make such reports available to anyone except the National Prosecuting Authority (NPA). During the case, the respondents (including the Minister of Labour, the original inspector and the Chief Inspector) put forward three arguments as to why the Applicants should not be entitled to a copy of the Report:

- the OHS Act does not allow an interested party to have access to the Report;
- any disclosure of the Report would violate the principles of co-operative governance enshrined in s40 and s41 of the Constitution; and
- by virtue of s35 of the Compensation for Occupation Injuries and Diseases Act, No 13 of 1993 (COIDA), affected employees or their dependants cannot sue employers for damages arising from injuries or death caused by a workplace accident and hence the disclosure of the Report would be of no value to them.

The primary issue before the court was whether the Applicants, and similarly situated interested parties, were entitled to be furnished with a copy of the Report. The court found that the answer lay in an interpretation of s32. In coming to its decision the court acknowledged that s39(2) of the Constitution requires courts to promote "the spirit, purport and objects of the Bill of Rights" when interpreting legislation. It is trite that words in a statute must be given their ordinary grammatical meaning, unless doing so would result in absurdity.

The court found that "if the reports are not made available to interested parties, they could never become aggrieved by anything contained in it, as they would not have had sight of its contents. In this view, it is absurd to confer on interested parties a right to appeal against the finding of a report and at the same time deny access to the report." The court was referring to s35(1) of the OHS Act which permits an aggrieved person the right to appeal a decision of the Chief Inspector. Such a right could not be exercised without regard being had to the content of the s32 report.

The Court found that allowing interested parties access to s32 reports, would protect and promote various rights in the Bill of Rights and other important values enshrined in the Constitution.

This judgment does away with the Department of Labour's prior blanket policy to refuse anyone except the NPA access to a s32 report.

Fiona Leppan and Thandeka Nhleko

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.

The 21st World Congress promises to provide a platform for a stimulating discussion on labour and social security law in a global environment where sustained economic and social uncertainty appears to have become the norm.

The main keynote speakers are Professor Alain Supiot, Doctor in Law at the Collège de France in Paris and Professor Sir Bob Hepple, Emeritus Master of Clare College at the University of Cambridge.

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CHAMBERS GLOBAL 2014 - 2015 ranks our Employment practice in Band 2: Employment.

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Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2015 in Band 2: Employment.

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