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EMPLOYMENT RETRENCHMENT ALERT SERIES

The Employment Practice is doing a series of Alerts focused on Retrenchment, against the backdrop of the tough economic climate.

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USING COST TO COMPANY AND OVERSTAFFING AS RETRENCHMENT CRITERIA

Section 189 of the Labour Relations Act, No 66 of 1995 (Act) regulates the retrenchment of employees, with the emphasis on the retrenchment procedure as opposed to the substance of a proposed retrenchment of employees. The Act does not provide selection criteria for proposed retrenchments but requires parties to consult with a view of reaching agreement thereon.

ARE AUTOMATIC TERMINATION CLAUSES ENFORCEABLE?

Due to public interest considerations, the Constitutional right to fair labour practices is entrenched in the framework of the Labour Relations Act, No 66 of 1995 (Act). The court in *Mwelase and Others v Enforce Security Group and Others* [2015] LC 46 dealt with whether it is permissible to contract out of the right not to be unfairly dismissed.

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As most retrenchments are for economic reasons, many employers prefer the cost to company selection criterion. Notwithstanding the above, the employer must show that the retrenchment is both substantively and procedurally fair.

The court in *Food And Allied Workers Union and Others v Cape Hospitality Services (Pty) Ltd t/a Savoy Hotel* (C419/2007) [2015] ZALCCT 51 (18 August 2015) 35 ILJ 3394 LC was faced with a question of unfair retrenchment on the basis that there was no consultation with the affected employees, nor with their trade union, and the selection criteria was not justifiable.

The court in Food And Allied Workers Union and Others v Cape Hospitality Services (Pty) Ltd t/a Savoy Hotel (C419/2007) [2015] ZALCCT 51 (18 August 2015) 35 ILJ 3394 LC was faced with a question of unfair retrenchment on the basis that there was no consultation with the affected employees, nor with their trade union, and the selection criteria was not justifiable.

The employees sought reinstatement. The employer had retrenched them on the basis that it was necessary to cut costs in the business. It must be noted that at the time of retrenchment the employees earned less than R3000 per month. The employer alleged that it held a meeting with the employees but not with the trade union (FAWU) because the union did not have majority membership. At the meeting, the employer claimed to have explained the financial position of the company and the possibility of retrenchments. The employer adopted cost to company and being overstaffed as the selection criteria.

The court interrogated all the above issues and held that the notion that the retrenchment of two employees who earned less than R3000 per month was critical to the operational costs of the company was unconvincing.

The court also held that the understanding that an employer has a duty to only consult with the union which has majority membership is incorrect in law. In line with the hierarchy of consultation provided in s189(1)(b)(ii) of the Act, in the absence of a collective agreement and a workplace forum, the employer is required to consult with the registered trade union whose members are likely to be affected by the proposed dismissals. The union in question, FAWU, had long since been recognised as a representative union and the employer was obliged to consult with it.

Turning to the selection criteria, the employer adopted cost to company and being overstaffed as the criteria. On the point of cost to company, the court looked at the fact that the employees were only earning R3000 per month. On the point of being overstaffed, the court looked at the fact that the employer was advertising for a chef in the same department where the employees were dismissed.

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CONTINUED

The court found the retrenchment to be both procedurally and substantively unfair as there was no evidence to prove the meeting with the employees took place.

The court found the retrenchment to be both procedurally and substantively unfair as there was no evidence to prove the meeting with the employees took place and because the selection criteria was not justifiable; the court ordered reinstatement with back-pay.

Although LIFO is the most commonly chosen selection criterion, the cost to company and being overstaffed criteria are acceptable but only if they are justifiable on the facts and such criteria must be a result of a joint-consensus seeking process between the employer and the consulting parties as contemplated by s189(2)(b) of the Act. These criteria cannot be adopted unilaterally by the employer as this would result in procedural unfairness.

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ARE AUTOMATIC TERMINATION CLAUSES ENFORCEABLE?

A clause in the contracts of employment required each employee to agree that the termination of a contract between the employer and the client would automatically terminate the employee's employment contract and most importantly, such termination would not be construed as a retrenchment but as a completion of contact.

Due to public interest considerations, the Constitutional right to fair labour practices is entrenched in the framework of the Labour Relations Act, No 66 of 1995 (Act). The court in *Mwelase and Others v Enforce Security Group and Others* [2015] LC 46 dealt with whether it is permissible to contract out of the right not to be unfairly dismissed.

The employer was a private security service provider who entered into contracts with different clients and employed security officers on a temporary basis. A clause in the contracts of employment required each employee to agree that the termination of a contract between the employer and the client would automatically terminate the employee's employment contract and most importantly, such termination would not be construed as a retrenchment but as a completion of contact.

The court found that the above clause has the effect of denying employees the right to challenge the fairness of the employer's conduct and enforce their rights in terms of s189.

When the client terminated the contract with the employer, the above clause was enforced by the employer but this was challenged by employee's trade union which relied on s189 of the Act. It was the trade union's view that the employer was under an obligation to retrench the employees and the employees were entitled to severance pay.

The court found that the above clause has the effect of denying employees the right to challenge the fairness of the employer's conduct and enforce their rights in terms of s189 which, among other things, includes consultation and severance pay.

The court discussed the case of *Mahlamu v CCMA & Others* (2011) 4 BLLR 381 (LC) where the court had to decide a similar question. The court held that the test is whether the subject of the right was intended to be the sole beneficiary. It found that the public interest rests with preventing exploitation and the waiver of their rights and in this regard individuals cannot waive the right not to be unfairly dismissed. Further, in *South African Post Office v Mampeule* [2009] 8 BLLR 792 (LC) the court decided the validity of automatic termination clauses. It held that such provisions are impermissible in their truncation of the unfair dismissal protections afforded by the Act and are contrary to public policy.

The court relied on the above cases and held that even though an employee might be deemed to have waived their rights conferred by the Act and the Constitution, such waiver is not enforceable as the Act not only caters for individual interest but also public interest. Accordingly, the court found the employees' dismissal to be both procedurally and substantively unfair, and ordered compensation and severance pay.

Although the principle is clear that, when abused, automatic termination clauses are unenforceable in our law, it must be borne in mind that the facts of this case are unique in that the employer was a temporary employment service provider and the employees were lay persons. What one notes from this case is that employers should consider Chapter 8 of the Act (Unfair Dismissal) when drafting employment contracts especially termination clauses.

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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.

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 Emeritus Master of Clare College at the University of Cambridge.

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