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EMPLOYMENT ALERT

IN THIS ISSUE

Changing the provisions of a policy governing benefits which forms part of the T&Cs of employment

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Delayed visa and permit applications: When your application gets 'lost in the system'

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Changing the provisions of a policy governing benefits which forms part of the T&Cs of employment

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On 20 June 2019, the Labour Court handed down judgment in *Skinner & 208 Others vs Nampak Products Limited & Others* (Labour Court: case no: JS197/16) in a matter concerning the provision and limitation by Nampak of a post-retirement medical aid benefit (PRMA) contained in an applicable Policy. The Policy formed part of the eligible employees' terms and conditions of employment.

The Applicants mainly consisted of future pensioners, with some having retired during the course of this litigation. To qualify for PRMA benefits upon retirement, certain pre-requisites had to be met pertaining to a minimum length of service with Nampak and a minimum period of membership, first with Nampak's internal medical scheme, and thereafter with Discovery. Nampak's in-house scheme was taken over by Discovery several years ago due to the costs associated with its operation.

The Applicants had been entitled to a 100% contribution in respect of their PRMA benefits which was not sustainable. Nampak was facing difficult trading conditions and so on 25 September 2014, having considered its position and taken legal advice thereon, it introduced a cap being on the amount of the monthly contribution that it was prepared to pay towards such benefit. The aim was to manage the extra-ordinary costs associated with medical inflation over which Nampak had no control.

The Applicants' claim was on three bases:

- breach of contract: the decision to cap allegedly constituted a breach of the Applicants' conditions of employment, including Nampak's decision to retain the PRMA liability upon the sale of certain businesses in South Africa;
- unfair labour practice (ULP): did Nampak's exercise of a discretion to cap the benefit constitute an unfair labour practice; and
- whether the purchasers of the businesses that Nampak had sold should assume the liability in respect of the PRMA benefits for their employees who had transferred from Nampak.

Onus

The onus in respect of these claims rested on the Applicants. It was agreed for the purposes of this trial that, in addition to the contractual claim, only substantive fairness of the ULP claim would be determined by the court.

Interpretation of the Policy

The relevant clauses read as follows:

Clause 3.3.3

"Subject to the provisions of clauses 3.3.6, 3.3.7 and 4, the Company will pay 100% of the medical and contribution where the employee has at least 25 years' continuous service with the Company and 10 years' membership of a company acknowledged medical aid society at date of retirement ... ."

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For the Applicants to show that there had been a breach of contract, they would have had to lead evidence of non-performance or malperformance by Nampak.

Clause 4.1

"The Company may at its sole discretion in respect of future pensioners set a maximum level at which it is prepared to contribute towards medical society benefits. The pensioner will be responsible for the difference between the actual medical aid society contribution levied by the applicable medical aid society and the maximum level set by the Company".

The court found that when parties use the phrase "subject to", they intended to create a condition applicable to the contribution to be made by Nampak in future. The clause permitted Nampak to exercise its' "sole discretion" thereby giving it wriggle room to take account of financial costs and the need to curtail same.

For the Applicants to show that there had been a breach of contract, they would have had to lead evidence of non-performance or malperformance by Nampak. The court concluded that the Applicants failed and the cap was not contrary to the provisions encapsulating Nampak's rights under the Policy.

Could Nampak exercise an unfettered discretion?

The court said if it was wrong to conclude Nampak's discretion was unfettered, then it would need to consider whether the discretion had been exercised *"arbitrio bono vino"*, meaning "the decision of a good man", namely a reasonable decision. This is an objective test.

The court found that Nampak had:

- taken steps to establish the legality of its intended actions;
- before proposing the cap to its board of directors, it had engaged in an exercise that considered all relevant aspects of its intended action; and
- the board had robustly engaged on the issues and "considered all angles including the possible termination for operational requirements had the discretion not been exercised".

The court found that these steps constituted the actions of a good man. It said: "A good man would take steps to arrest a financial situation that may have a serious ripple effect-loss of employment".

Where a party seeks to enforce a common law right, it would be inappropriate to combine the principles applicable to the interpretation of contracts with a right to a fair labour practice enshrined in the Bill of Rights. The court gave the example of restraints of trade clauses contained in a contract of employment. When courts interpret restraints of trade, they do not do so by taking into account a right to an unfair labour practice. Hence, the contract of employment should be interpreted like any other contract. Accordingly, the claim for breach of contract failed.

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The court found that Nampak had acted lawfully and with a clear commercial rationale in mind.

Did Nampak commit any unfair labour practice?

To succeed on this ground, the Applicants had to prove whether there was an "act or omission" which was unfair. The Applicants asserted that Nampak's decision:

- had been arbitrary;
- had been exercised to accommodate the buyers of the businesses that had been sold by Nampak;
- demonstrated no regard to the contractual rights and consequences for the Applicants'; and
- was exercised without considering the availability of other funds to secure their PRMA benefits.

The Applicants were critical of Nampak's sale of businesses and not passing the PRMA liability to the "new" employers, but the facts indicated that unless that liability was retained, the sale of those businesses may well not have succeeded.

The court found that Nampak had acted lawfully and with a clear commercial rationale in mind. It was a contradiction to suggest that where there is commercial rationality, there is unfairness. It was "not for the court to decide whether capping was the correct answer to rising financial costs". Nampak did not act with any ulterior motive.

The Applicants were aware of the declining profitability of the business and that it was reasonable to investigate ways to limit a burgeoning PRMA liability. The court mentioned "... in passing that this court and the LAC accepted that it may be fair to dismiss an employee for operational requirements if he/she refuses to accept a change to terms and conditions of employment".

The ULP claim was dismissed.

Conclusion

The court rejected both the Applicants' claims and refused to pass the PRMA liability to the purchasers of the businesses sold as there was no basis to do so.

The writer acted for Nampak in this litigation.

Fiona Leppan

Delayed visa and permit applications: When your application gets 'lost in the system'

The Applicants' main contention in this matter was that the Department has for several years now, been failing to determine applications made to it in any reasonable or lawful time period.

In the case of *Director-General of the Department of Home Affairs and Others v De Saude Attorneys and Another* [2019] 2 All SA 665 (SCA) (29 March 2019), the Supreme Court of Appeal (SCA) dismissed an application by the Department of Home Affairs (the Department) to appeal an order by the Western Cape Division of the High Court, Cape Town wherein the court compelled the Department to process applications and appeals within the structure of the Immigration Act, No 13 of 2002 and the South African Citizenship Act, No 88 of 1995 after prolonged delays.

The application in the High Court, brought at the instance of De Saude Attorneys and Immigration Management Services SA CC also known as Visa One (the Applicants), sought to compel the Department to comply with their obligations in terms of the Constitution and the relevant legislation by making decisions within set deadlines. The Applicants, at the time that the application was heard in the High Court, represented 323 affected individuals who were foreign nationals and who had been subject to the Department's failure to make timeous decisions regarding their permanent residency permits and visas.

The Applicants' main contention in this matter was that the Department has for several years now, been failing to determine applications made to it in any reasonable or lawful time period.

The Applicants insisted that this is part of a repeated pattern of how the Department deals with applications which its officials are constitutionally and statutorily obliged to determine.

The Department's response to the application was not to challenge the facts laid out by the Applicants (which included numerous examples of what the court deemed "devastating effect[s]" of the delays), but rather to challenge the Applicants' application on technicalities such as *locus standi,* the jurisdiction of the High Court and to adopt the position that there was a case of misjoinder.

On the question of *locus standi*, the court referred to various case law to emphasise that a broad approach must be taken when it comes to standing and that the Constitution expands the persons with standing beyond a direct and substantial interest and now includes people who act on behalf of people who can't act or on behalf of the public interest in general. The Department tried to argue that the Applicants were acting purely in their own financial interest. The court however, refused to accept this notion and held that the Applicants' clients as well as the South African public at large, have an interest in the proper administration of legislation. The Applicants illustrated that the broader public interest was being implicated by this institutional dysfunction and were as such, held to have *locus standi*.

Delayed visa and permit applications: When your application gets 'lost in the system'...*continued*

This case only adds to the plethora of case law against the Department in its failing to adjudicate visa and permit applications timeously.

The SCA further held that the Department's reliance on misjoinder was without merit in that the Department was disillusioned in suggesting that the Applicants' clients each launch a separate application with concomitant costs which the taxpayer must bear the burden of. The court highlighted that each application would have the same overall complaint, that the Department failed to meet its statutory obligation to make decisions timeously.

Lastly, insofar as the jurisdiction of the High Court in Cape Town was concerned, the Department contended that since adjudicative functions were carried out in Pretoria and the statutory decision makers and supervisory officials were located there, the High Court in Cape Town had no jurisdiction. The SCA, in having regard to s6(1) of the Promotion of Administrative Justice Act, No 3 of 2000, its definition of 'court' and the provisions of the Superior Courts Act, No 13 of 2010, held that the Minister of Home Affairs had a principal place of business within the jurisdiction of the High Court and that by virtue of the provisions of the Superior Courts Act, the High Court in Cape Town had jurisdiction to entertain the application. The court concluded by remarking that the ineluctable conclusion is that the stance adopted by the Department in respect of the litigation was one that was deliberately obstructive and dilatory and that its approach was unconscionable and disgraceful. The appeal was dismissed.

This case therefore only adds to the plethora of case law against the Department in its failing to adjudicate visa and permit applications timeously. The SCA does however, provide some helpful jurisprudence to assist foreigners with access to courts in order to compel the Department to process long, outstanding visa and permit applications which seem to have become 'lost in the system'.

Michael Yeates and Kirstin Swanepoel

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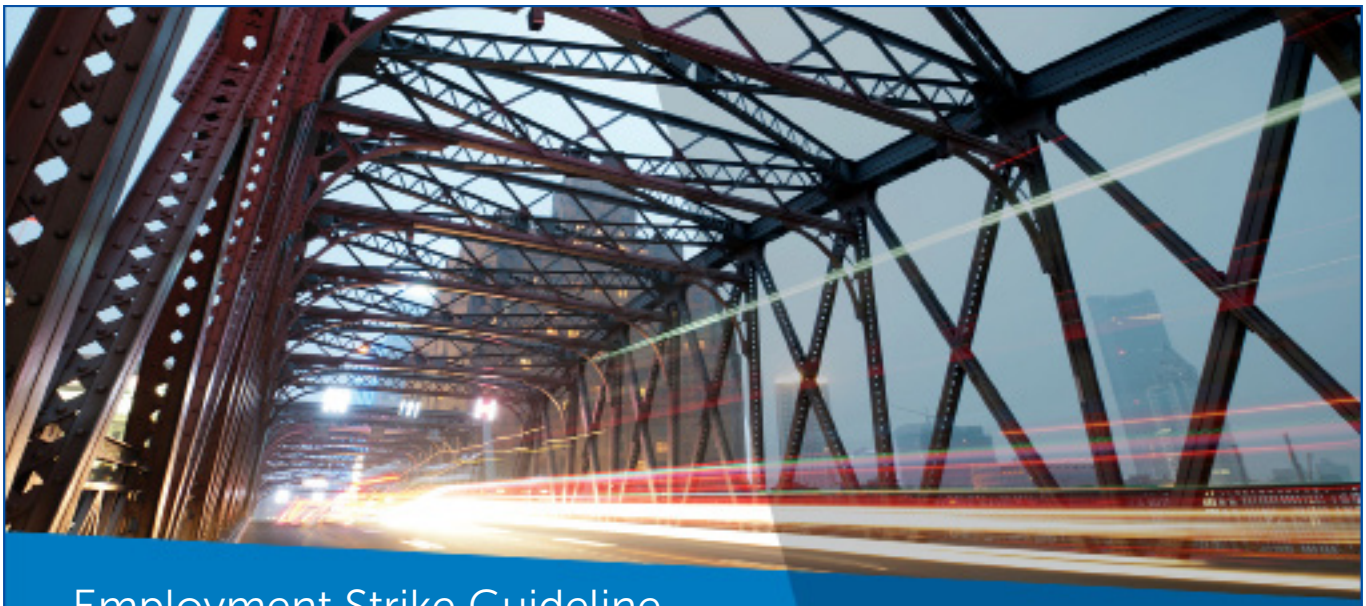

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