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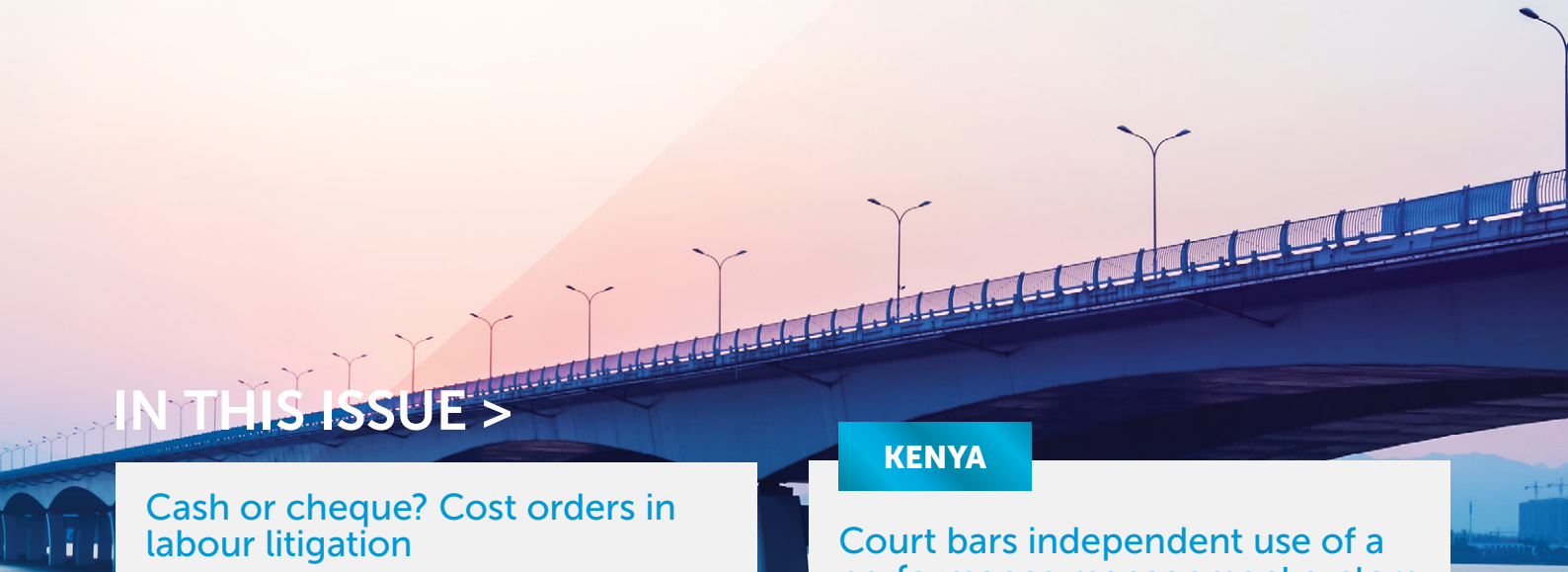
EMPLOYMENT LAW ALERT



IN THIS ISSUE >

Cash or cheque? Cost orders in labour litigation

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KENYA

Court bars independent use of a performance management system to terminate an employment contract

Performance management systems are usually used by employers to assess the performance and productivity of their employees.

Dishonesty and misrepresentation

Employment law places a high premium on honesty. The foundation of the employment relationship is trust and confidence. Where this foundation is damaged, the parties cannot be expected to continue with the employment relationship. The case of *Mothiba v Exxaro Coal (Pty) Ltd t/a Grootgeluk Coal Mine* considers the consequences of dishonesty and misrepresentation by an employee.

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Cash or cheque? Cost orders in labour litigation

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The general rule in litigation is that costs follow the result. In layman's terms, this means that the losing side will be paying the bill when it eventually arrives. However, like most things in law, there is a general rule and then there are exceptions to this general rule. The exception to the general rule that costs follow the result is found in labour disputes where it is often a David versus Goliath encounter as vulnerable employees seek to enforce their rights against seemingly omnipotent employers who have access to vast resources.

This was the issue before the Constitutional Court in the recent case of *Union For Police Security and Corrections Organisations v South African Custodial Management (Pty) Ltd and Others* [2021] ZACC 26. For the purposes of this alert, it is not necessary to discuss the merits of the application at length, save to say that the applicant brought an application before the Labour Court (LC), when it was clear that the application fell within the jurisdiction of the Commission for Conciliation, Mediation and Arbitration (CCMA). The LC dismissed this application and the applicant sought leave to appeal, and the LC this time ordered costs against the applicant. The applicant then approached the Labour Appeal Court (LAC) which also dismissed the applicant's appeal on the basis that the appeal lacked merit. Interestingly, the LAC did not interfere with the LC's decision to award costs against the applicant.

The applicant then launched an appeal to the Constitutional Court. The Constitutional Court differentiated between the applicant's appeal on the merits and on the adverse cost order handed down by the LC.

Appeal on the merits

The Constitutional Court found that the LC's reasoning on the merits was "*unassailable*" and therefore found no reason to interfere with this aspect of the judgment. Accordingly, the applicant's appeal on the merits was dismissed.

Appeal on the costs order

The Constitutional Court then turned its focus to the adverse cost order handed down by the LC against the applicant. The Constitutional Court gave its support to the trite principle that in litigation costs follow the result, but found, however, that this general rule does not apply to labour matters and cited its own jurisprudence in *Zungu v Premier of the Province of KwaZulu-Natal* [2018] ZACC 1. The Constitutional Court reasoned that the decision to deviate from the general principle pertaining to costs in litigation was not borne out of "*overzealous generosity*" but rather cited sections 23 and 34 of the Constitution which deal with labour rights and access to courts. The Constitutional Court found that section 162 of the Labour Relations Act 66 of 1995, as amended (LRA) confers courts with the discretion to make appropriate cost orders, taking into account the principles of law and fairness. The Constitutional Court was at pains to point out that when making cost orders in labour matters, a court is required to apply the fairness standard enriched in the LRA. Ultimately, the Constitutional Court upheld the applicant's appeal on the costs and set aside the adverse cost order made by the LC.

Cash or cheque? Cost orders in labour litigation...*continued*

Litigation is already a costly exercise and it would not be in the interests of justice to award costs orders against employees and or trade unions who have bona fide approached the courts seeking refuge.

Analysis

The reason the general rule pertaining to costs does not apply in labour litigation is because the courts are alive to the unequal power relationship between often desperate employees and their employers who have vast resources at their disposal. Litigation is already a costly exercise and it would not be in the interests of justice to award costs orders against employees and or trade unions who have bona fide approached the courts seeking refuge.

That being said, a court will still be required to exercise its discretion judicially by applying the "*law and fairness*" standard when making a determination on costs in labour litigation, or risk being on the wrong end of a scolding from a higher court.

By Michael Yeates and Thato Maruapula

KENYA

Court bars independent use of a performance management system to terminate an employment contract

Terminating an employment contract purely on the performance of the employee based on data obtained from a performance management system does not constitute a valid reason to terminate the employment contract.

Performance management systems are usually used by employers to assess the performance and productivity of their employees. Employees who perform well are lauded while those who perform dismally are taken through disciplinary hearings that seek to address their underperformance. The disciplinary hearings usually result in an employee receiving either a warning letter or a letter terminating their employment.

The decision of the Employment and Labour Relations Court in the case of *Naomi Connie Lusiche v Barclays Bank of Kenya* [2021] eKLR has now made it unlawful for an employer to terminate the services of an employee solely on the results obtained from a performance management system.

In this case, the court opined that the use of these performance management system as a mode of terminating employees contravenes section 45 of the Employment Act, which states that no employer is allowed to terminate an employment contract without valid reasons. To this end, the court identified that terminating an employment contract purely on the performance of the employee based on data obtained from a performance management system does not constitute a valid reason to terminate the employment contract.

The court further stated that the purpose of a performance management system is not to diversify the modes of terminating an employment contract but rather to address a perceived employment failure. In addition, the court indicated that an "*objective*" performance management system should address three key issues; one, whether there exists an underperformance in the workplace, two, why an employee has underperformed, and three, how that underperformance may be rectified.

The impact of the judgment on employers

This decision has now clarified the purpose and role of performance management systems in the work environment. Employers should, going forward, use these systems to strengthen and improve their employees' performance. Performance management systems should not be independently used as a mode of firing employees but their function should rather be to help the employers get the best out of their employees.

Njeri Wagacha and Daniel Munsiro

Dishonesty and misrepresentation

Grootgeluk's housing department offered subsidised accommodation for employees that lived far from the mine.

Employment law places a high premium on honesty. The foundation of the employment relationship is trust and confidence. Where this foundation is damaged, the parties cannot be expected to continue with the employment relationship. The case of *Mothiba v Exxaro Coal (Pty) Ltd t/a Grootgeluk Coal Mine* considers the consequences of dishonesty and misrepresentation by an employee.

In 2008 Mothiba was employed at the Grootgeluk Coal Mine as a laboratory assistant. This is a relatively specialised position requiring an employee with the relevant level of education and experience.

Grootgeluk's housing department offered subsidised accommodation for employees that lived far from the mine. Employees applying for the subsidy had to depose to an affidavit confirming that "*I do not own any property within a 50km radius from the main gate of Exxaro Grootgeluk Coal*".

In December 2012, Mothiba applied for subsidised accommodation. She also signed the affidavit confirming that she did not own property within a 50km radius of the main gate.

In January 2015, Grootgeluk was tipped off that a number of its employees, including Mothiba, had improperly benefitted from the subsidy when they should not have. Grootgeluk investigated the matter and found that in Mothiba's case she owned some open land within a 50km radius of the main gate when she made her application. This obviously meant that she had lied under oath to her employer in the affidavit that was part of her application for the subsidy.

Mothiba was subjected to a disciplinary hearing where she had to answer to allegations of dishonesty and non-disclosure or misrepresentation of relevant information. Mothiba was found guilty of the allegations and dismissed. Aggrieved by her dismissal, Mothiba referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

The CCMA delivered its award on 26 October 2015. The arbitrator found that Grootgeluk had failed to discharge the requisite onus of proving that the employee intentionally made a false declaration in the affidavit. His analysis of the evidence focussed on the phrase "*I do not own any property within a 50km radius*". He found that the wording was ambiguous as it lacked clarity on whether it was referring to an empty stand or a stand that had been improved into a dwelling house.

Review application

Unhappy with the finding, Grootgeluk launched a review application in the Labour Court (LC). The application was brought on 4 December 2018, some three years later. It is not clear what led to the delay but the Labour Appeal Court (LAC) lamented the failure of the adjudicative system to fulfil its legislative mandate of ensuring the expeditious resolution of labour disputes.

On review, the LC disagreed with the arbitrator. It found that the wording in the affidavit was unambiguous when it referred to "*ownership of any property*". The court noted that Mothiba was not an illiterate employee. She was a laboratory assistant and therefore could be taken to understand the meaning of the words "*ownership of any property*".

Dishonesty and misrepresentation

...continued

It found that the arbitrator had unreasonably, on his own volition, substituted his own opinion as to the words *"ownership of property"* rather than accepting the only reasonable construction of the words.

The court found it difficult to understand how the arbitrator could reasonably conclude that Mothiba had signed affidavit without applying her mind to what was recorded in it. It found that she could not have been "blissfully unaware" of what it contained nor could she have been unaware of the fact that by deposing to the affidavit she was making a representation that she held no interest in any property. The court set aside the arbitration award and held that Mothiba's dismissal had been substantively fair.

Mothiba appealed to the LAC. The LAC gave short shrift to her appeal. It rejected her argument that the word *"property"* had to be given a narrow meaning, limiting it to properties that were ready for habitation as opposed to open land. The court found that Mothiba had offered no evidence that she had not reasonably understood the contents of the affidavit which she was required to sign. She was aware that the affidavit was in connection with a lease which would not have been extended to her if Grootgeluk knew that she had property within 50km of the main gate.

It found that the arbitrator had unreasonably, on his own volition, substituted his own opinion as to the words "ownership of property" rather than accepting the only reasonable construction of the words. He had no reason to delve into whether she had signed a disclosure about ownership of improved land with a dwelling as opposed to ownership of vacant land.

This case reiterates the premium placed on the relationship of trust in the employment context. Where an employee misrepresents the facts to their employer to benefit themselves, it will almost inevitably lead to an irretrievable breakdown in the trust relationship. Both the LC and the LAC were alive to this principle and saw through the legal sophistry raised by Mothiba and her legal team, cutting to the heart of the matter: whether the trust relationship had been damaged.

Jose Jorge and Mbulelo Mango

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