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EMPLOYMENT LAW ALERT

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Refusal to testify in an arbitration may result in a fair dismissal

As a result of her refusal, the employee was disciplined and dismissed. She then referred an unfair dismissal dispute to the CCMA.

Employees have a duty to comply with the lawful and reasonable instructions of their employer. But would the failure to comply with an instruction to testify in an arbitration before the Commission for Conciliation, Mediation and Arbitration (CCMA) amount to insubordination and warrant dismissal? This is the question which the Labour Appeal Court (LAC) was required to decide in *Kaefer Energy Projects (Pty) Ltd v CCMA and Others* (LAC) (Case no: JA59/20), a judgment handed down on 26 October 2021.

The employee was dismissed for misconduct following her refusal to testify on behalf of her employer in an unfair dismissal arbitration brought by a former employee, Tebogo Maili. There was no dispute that a heated altercation took place between Maili and the employee's manager, which was overheard by the employee. In response, the employee rushed to her manager's office and escorted Maili out of the office to avoid the situation escalating any further. The altercation resulted in Maili being dismissed. He then referred an unfair dismissal dispute to the CCMA. As the employee was a key witness to the altercation, her manager instructed her to testify in the arbitration proceedings regarding her recollection of the events.

The employee initially refused to testify on the basis that she did not believe that her evidence was relevant and that she could not recall precisely what had been said. In response to her refusal, the employer once again instructed the employee to testify. The employee initially maintained her position that she could not recall what had happened and advised that she did not want to be a witness. The employee was told to take some time and think about the matter and come back to her manager. A few hours later, the employee informed her manager that she recalled everything and that she would testify. Despite this, the employee then changed her mind again and sent a message to her manager informing her manager that she no longer intended to testify. This was on the Friday evening before the arbitration commenced on Monday the following week. The employee failed to respond to calls and messages from her manager and failed to attend the arbitration. As a result of her refusal, the employee was disciplined and dismissed. She then referred an unfair dismissal dispute to the CCMA.

When addressing the employee's refusal to testify, the arbitrator at the CCMA held that the employee did not commit misconduct as no evidence was led that she deliberately refused to testify to protect

Refusal to testify in an arbitration may result in a fair dismissal...*continued*

The employee's justification for her refusal to testify was that she could not remember everything that happened, that her evidence would be of no use to the employer and that she would make a fool of herself if she testified.

Maili or to conceal evidence. The arbitrator concluded that if the employee was an important witness, the employer should have subpoenaed her.

Labour Court

Dissatisfied with the outcome, the employer instituted review proceedings. The Labour Court agreed with the arbitrator and concluded that the employee could not be dismissed for refusing to testify. While the Labour Court came to the same conclusion as the arbitrator, it did so on different grounds. It held that the employer could not dismiss the employee for refusing to testify and in making this decision relied on section 5(3) of the Labour Relation Act 66 of 1995 (LRA). Section 5(3) provides that "*no person may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act.*" The court reasoned that the corollary of this section is that no person may be prejudiced for refusing to participate in any proceedings. The Labour Court concluded that a witness who refuses to testify may be compelled to do so by means of a subpoena and that an employer's contractual power does not extend to instructing an employee to testify against their will.

On appeal, the employer argued that the employee breached her duty of good faith and that her refusal to testify amounted to insubordination. The LAC held that the arbitrator was required to consider (i) the misconduct which the employee was alleged to have committed, (ii) whether the instruction was lawful, reasonable or fair, (iii) whether the employee was in a position to carry out the instruction, and (iv) whether the employee had a lawful or reasonable basis for her refusal to comply with the instruction.

When considering the evidence placed before the arbitrator, the LAC took into account the fact that when the employee changed her mind and agreed to testify, she acknowledged that she recalled the events and was in a position to testify. The court held that the arbitrator "*missed the point altogether*". The employee was given a reasonable and fair instruction, she was not coached or told what to say and was merely requested to testify as to her recollection of what was said during the altercation. The court found that "*notwithstanding her periodic amnesia*", the employee could at the very least have testified about there being an altercation in which she intervened.

The employee's justification for her refusal to testify was that she could not remember everything that happened, that her evidence would be of no use to the employer and that she would make a fool of herself if she testified. In considering this justification for her refusal to testify, the court held that it was not for the employee to determine whether her evidence was relevant. She was instructed to testify and had a duty to comply with the instruction. The employee could have refused the instruction, provided that her reasons for doing so were valid and acceptable. Depending on the facts, this may include something like intimidation by other employees or the community, which should be brought to an employer's

Refusal to testify in an arbitration may result in a fair dismissal...*continued*

> The LAC held that the fact that an employer does not issue a subpoena does not mean that an employee cannot be disciplined for refusing to carry out the instruction, where the instruction is reasonable.

attention immediately. The court held that these are some of the instances in which a subpoena may be pursued as well as the implementation of measures to protect the employee. However, no such reasons were relied upon by the employee in this case.

Reasonable instruction

The LAC noted that both the arbitrator and the Labour Court placed significant reliance on the issuing of a subpoena in circumstances where an employee refused to testify. In contrast, the LAC held that the fact that an employer does not issue a subpoena does not mean that an employee cannot be disciplined for refusing to carry out the instruction, where the instruction is reasonable. The LAC concluded that in the absence of a valid and reasonable excuse for failing to comply with the instruction, the employee was guilty of misconduct.

When addressing the appropriate sanction, the court considered that an employee's failure to comply with an instruction is serious and constitutes a challenge to the employer's authority. Based on the facts and given the employee's varied position as to whether she recalled the events or not, the court found that the employee's dismissal was fair.

Given that employees frequently play a critical role in testifying against fellow and/or former employees in arbitration proceedings, this case is important authority for the fact that where an employee refuses to testify and has no valid excuse for doing so, this may constitute a dismissible offence.

Gillian Lumb, Taryn York and Kelebogile Selema

Labour Court declares the re-election of AMCU president unlawful

Section 95(5) of the LRA provides that a trade union must include in its constitution the required qualifications for individuals seeking membership, and the circumstances when membership will terminate.

A trade union is an association of employees who are its members and is defined as such in the Labour Relations Act 66 of 1995 (LRA). Speaking to this fundamental tenet of organised labour in *Nkosikho Joni v Association on Mineworkers and Construction Union and Others*, the Labour Court was tasked with the question of whether AMCU's president could assume that role despite not being an employee in a sector that the trade union represents.

Nkosikho Joni (the applicant) approached the Labour Court on the basis that his removal from office and his expulsion as member of the Association on Mineworkers and Construction Union (AMCU) were unlawful as he contended that AMCU's president, Joseph Mathunjwa, and its treasurer-general, Jimmy Gama, were ineligible for re-election to office at AMCU's 2019 national congress.

While the applicant sought relief on various grounds, including an order that his removal and expulsion from AMCU were invalid, we limit our review of the case to the ground on which the applicant was successful: that the appointment of AMCU's president was unlawful given that he was not an employee in the mining sector at the time of his re-election, and this was a prerequisite in terms of AMCU's constitution. How did the Labour Court arrive at such a conclusion?

As a point of departure, section 95(5) of the LRA provides that a trade union must include in its constitution the required qualifications for individuals seeking membership, and the circumstances when membership will terminate. This, in turn, would inform the effect that such requirements may have on AMCU office bearers. To that end, AMCU's constitution provides that membership is open to any worker who is eligible to join it and subscribe to AMCU's terms.

The Labour Court considered three important definitions in AMCU's constitution regarding members and office bearers, as follows:

- a "*member in good standing*" is "*an employee who is paying his/her stop order subscription deductions in favour of AMCU on a monthly basis and those office bearers who are currently in the organisation*";
- an office bearer is "*an elected member of the branch, region, national and central executive committee*"; and
- the President is "*a member elected in accordance with the constitution and hold[s] office as an office bearer*".

AMCU distinguished between "*sector members*" being employees employed in relevant sectors within the trade union's registered scope and "*honorary and associate members*". The latter membership class cannot exercise a casting vote.

It was argued that for one to be an office-bearer, one must be a member too. The applicant contended, and the Labour Court agreed, that AMCU's constitution indicates that honorary members shall not be eligible to be elected to the role of president because that requires the president to have the casting vote to perform in accordance with the constitution.

Conditions for losing membership

Having considered the qualifications and classifications for eligible membership of AMCU, the Labour Court turned to the question of which circumstances could result in members losing their membership. A member would lose their membership 14 weeks after becoming unemployed in the relevant sectors recognised within AMCU's constitution. However, membership would continue in circumstances where the dismissed

Labour Court declares the re-election of AMCU president unlawful...*continued*

The facts demonstrated that AMCU had adhered to the dictates of its constitution in previous similar circumstances by striping an office bearer of his status following the termination of his employment.

member was eligible for honorary membership, and was re-employed in the relevant sectors, or if AMCU was in the process of disputing the member's dismissal.

It was common cause that the president of AMCU was retrenched in the course of 2013 and did not dispute the termination of his employment. As such, he was not an employee at the time that he was re-elected as president, instead he served AMCU on a full-time basis. AMCU's president ceased to be a sector member of AMCU 14 weeks after his employment had been terminated in 2013. It was argued that it was AMCU's policy to allow an office bearer to complete their term of office even if dismissed by their employer and ceased to be an employee in one of the relevant sectors, and if they were to continue in that position, such member would also qualify for re-election to that position as well.

The Labour Court remarked that it would recognise AMCU's policies only to the extent that the alleged policy was not contrary to what was set out in its constitution. This notwithstanding, the court was not presented with evidence to demonstrate that such a policy existed. On the contrary, the facts demonstrated that AMCU had adhered to the dictates of its constitution in previous similar circumstances by striping an office bearer of his status following the termination of his employment where the dismissal had not been challenged. There was official correspondence in that instance which indicated that a member in good standing was defined as a member who was not only up to date with their subscriptions, but who was also an employee.

The Labour Court could not find any clause in the constitution that permitted an official to be eligible for re-election even after being dismissed by the employer where the dismissal had not been challenged. Based on the above, the Labour Court concluded that the re-election of Mathunjwa in September 2019 was unlawful and had to be set aside.

Weighing the retrospective effect

The Labour Court's final task lay in determining whether such a finding may be given retrospective effect as sought by the applicant. This enquiry required the court to balance the interests of justice, the interests of the individual, and the weight of administrative justice in that the undoing of countless transactions and decisions would have a devastating and unintended negative impact on the continued business and operation of such organisation. Ultimately, because the applicant's dispute only arose following his own removal from office and not when AMCU's president was re-elected, the court found that the interests of justice would be best served through a prospective order.

The matter remains unsettled however, as AMCU's leadership has lodged an application for leave to appeal the decision, thereby suspending the effect of the order that was granted.

Fiona Leppan, Amy King, and Kelebogile Selema

KENYA

Women's employment rights in the new normal

In 2021, one in three women were considering leaving their jobs or stepping back from their workplace responsibilities.

If you'd like to listen to a discussion on this topic, you can find our podcast on Women's Employment Rights in the New Normal from 8 November 2021 here.

The COVID-19 pandemic has put extraordinary pressure on employers and employees alike. Employers were forced to rethink what defines a "*workplace*", and employees had to learn to adapt to remote working. In particular, the events of 2020 and 2021 disproportionately affected women in employment, as existing gender inequalities were amplified by the dual responsibilities of work and caregiving.

A McKinsey Global study revealed that in 2020, women's jobs were 1,8 times more vulnerable to the COVID-19 pandemic than men's jobs; while 2 million women, particularly mothers with young children, considered taking less demanding jobs or leaving the workplace because of the additional strain brought on by the pandemic. A more recent report further revealed that in 2021, one in three women were considering leaving their jobs or stepping back from their workplace responsibilities. These women cited additional caregiving responsibilities as their main reason, with other reasons including worrying that their performance was being negatively judged and feeling as though they needed to be available to work at all hours.

Policies unchanged

Interestingly, although extensive research shows that the pandemic disproportionately affected women in the workplace, there has been a lack of corresponding measures to address this strain on women. In Kenya, workplace policies and expectations remain largely unchanged, leaving women feeling burnt-out, and increasingly more so than men.

In *MW v AN* [2021] eKLR, the judge delivered a noteworthy decision, stating that "*mothering, housekeeping, and taking care of a family ought to be given more value, especially where it is undertaken alongside formal employment*". Additionally, the judge opined that it was "*no longer a tenable argument to say that a stay-at-home mother or a working mother does not work when they are undertaking caregiving responsibilities, as this type of work ought to be considered employment in its own right.*" Likewise, in Yasmin Josephine Mokaya v Professor Kithure Kindiki t/a Kithure Kindiki & Associates [2021] eKLR, the court reaffirmed women's employments rights by determining that an employer who terminated a pregnant employee did so unlawfully and unconstitutionally. The court stated that an employer would not be permitted to make an unjustifiable excuse to terminate a female employee, especially during the employee's "*hour of need*".

Although these recent judgments advance and reiterate women's rights in the workplace, a greater shift is required from an employer's perspective in order to uphold women's rights. According to another McKinsey Global study, if we fail to specifically address women's challenges in the workplace during the pandemic, then global GDP in 2030 is predicted to be $1 trillion below what it would have been had the COVID-19 pandemic affected men and women equally.

Advancing gender equality

Employers need to take bold steps to address women's rights in the workplace. Advancing gender equity and women's employment rights in the new normal will require diverse efforts and a focus on how work is changing and what is truly required to get the work done.

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Women's employment rights in the new normal

Advancing gender equity and women's employment rights in the new normal will require diverse efforts and a focus on how work is changing and what is truly required to get the work done.

This suggests that employers may need to adjust the norms, expectations and policies that relate to women, to create a workplace where women feel valued and able to work optimally, whilst still allowing the organisation to meet its business objectives. Some of the changes that employers can make include:

- **Creating flexible work arrangements:** Employers should re-evaluate their policies to consider whether greater provision may be made for women. For example:
  - Providing for flexible working hours to allow women to work during optimal hours as opposed to set working hours.
  - Formulating a hybrid working policy that allows women to agree on when and where they can work, so as not to conflict with competing responsibilities.
- **Performance management:** Employers should ensure that the women in their workforce are monitored and managed in a less rigid manner. Some practical ways employers can do this include:
  - reviewing and discussing the employee's work and expected outcomes;
  - discussing how the employee intends to meet those outcomes, and what specific goals are to be met in achieving the outcomes;
  - agreeing on specific timelines to complete work; and
  - discussing monitoring systems that will assess the employee's continual performance.

  Thereafter, an employer may:
  - create a regular feedback system to check in with employees, which will help identify and address any challenges and keep the employee engaged, accountable and feeling valued; and
  - consider creating a policy that reiterates the performance and working expectations.
- **Disciplinary hearing:** Employers should consider reviewing and modifying their disciplinary hearing policies to ensure that they take women's employment rights into account. For instance, looking at what may amount to misconduct or poor performance in the COVID-19 pandemic and whether these standards disproportionately impact women.

The pandemic presents an opportunity for employers to promote women's employment rights in a deeper way. However, a balance must be struck between accommodating women's employment rights and the employer's economic objectives. We recommend that employers continually monitor the impact of the pandemic on the women in their workplace, in order to determine the appropriate measures that need to be put in place.

Njeri Wagacha, Rizichi Kashero-Ondego and Tyler Hawi Ayah

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