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EMPLOYMENT LAW ALERT

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Is an applicant required to furnish security when instituting an urgent application to stay the execution of an arbitration award?

The main issue before the LC was whether the employer is required to furnish security when instituting an urgent application to stay the execution of an arbitration award.

In *Emalahleni Local Municipality v Phooko and Others* (J396/21) [2021] ZALCJHB (5 May 2021) the Labour Court (LC) recently answered this question. In this case, the employee was appointed as head of the traffic and security department of the municipality (employer). The employee refused to report to his new position which resulted in his suspension.

Following a disciplinary hearing, the employee was dismissed. The employee then referred a dispute to the South African Local Government Bargaining Council (bargaining council) alleging an unfair dismissal. The bargaining council found in favour of the employee and an award was issued ordering the employer to reinstate the employee and to pay him compensation. The employer instituted review proceedings. Two months later, the employee's award was certified, and his trade union alerted the employer that steps would be taken in execution of the award.

Consequently, the employer brought an urgent application seeking an order to stay the enforcement of the arbitration award. The application was brought in contemplation of section 145 (3) of the Labour Relations Act 66 of 1995 (LRA), which states that the LC may stay the execution of an award pending its decision. Additionally, the application sought exemption from furnishing security in line with section 145(7) of the LRA, which states that "*the institution of review proceedings does not suspend the operation of an arbitration award, unless the applicant furnishes security to the satisfaction of the Court in accordance with subsection (8)*".

The main issue before the LC was whether the employer is required to furnish security when instituting an urgent application to stay the execution of an arbitration award.

The LC held that bringing a review application does not automatically suspend the operation of an arbitration award and traditionally, one would need to furnish security to do so, unless good cause was shown to be exempted from furnishing security. Additionally, it was stated that the LC retains a discretion to stay the enforcement of an award pending its decision in line with section 145(3). This is a self-standing discretionary power and once exercised its effect is that the enforcement of an arbitration award is stayed pending the decision of the LC.

During its evaluation the LC analysed the general principles for the granting of a stay in execution. Notably, the LC illustrated that nowhere in the principles does it state that there is a requirement to furnish security or to be absolved from such before a stay in execution may be granted, and once a party satisfies the necessary requirements, a stay in execution must happen irrespective of whether a party has furnished security or not.

Is an applicant required to furnish security when instituting an urgent application to stay the execution of an arbitration award?*...continued*

The LC in the present matter, held that it was satisfied that the employer had sufficient assets to execute if the review application was decided in favour of the employee.

Ultimately, the LC relied on the recent decision of the *Labour Appeal Court (LAC) in City of Johannesburg v Samwu obo Monareng and another* (C1230/2018), where the LAC concluded that a party is exempt from furnishing security where the applicant has made a case and shown good cause to be absolved from furnishing such security. Furthermore, in its judgement the LAC held that the onus lies with an applicant who must show that it has assets of a sufficient value to meet its obligations should the arbitration award be upheld by the LC on review. Having sufficient assets was seen by the LAC as a crucial safety net for an employee should the review application be decided in his/her favour.

As such, the LC in the present matter, held that it was satisfied that the employer had sufficient assets to execute if the review application was decided in favour of the employee. Therefore, it was not necessary for the employer to furnish security and the LC used its discretionary power to absolve the employer accordingly.

Employers must be cognisant that when attempting to protect their assets from execution, the furnishing of security is not a prerequisite for staying the execution of awards as long as good cause can be shown to that effect. This will be aided further by the value of the assets in the employer's possession.

Keenan Stevens, Mariam Jassat and Anli Bezuidenhout

Different approaches to COVID-19 breaches in the workplace

At the hearing, the employee contended that he had not received training on COVID-19 measures, nor was there any policy dealing with COVID-19 workplace protocols.

Two recent awards illustrate the different approaches that may be taken by bargaining councils and the CCMA in considering dismissals based on the disregard of COVID-19 measures in the workplace.

In the case of *Detawu abo Jacobs/Quality Express*, the National Bargaining Council for the Road Freight Logistics Industry upheld the dismissal of Mr Jacobs, a shop steward and a truck driver, for reporting for duty knowing that he was a COVID-19 risk and not notifying management that he had been tested for the virus and that he should have been in isolation.

Jacobs arrived at work on 3 August 2020, suffering from headaches. He was told to see a doctor, which he did. Jacobs was booked off from 4 to 6 August 2020. The medical certificate recorded that Jacobs was awaiting the results of a COVID-19 test. Jacobs reported to work on 6 August 2020 to represent a fellow employee in a disciplinary hearing. On arriving at work, he handed a brown envelope to the company. The envelope was in turn handed to the operations manager who discovered two notes in the envelope – a medical certificate and a note from the clinic to record that he had taken a COVID-19 test on 4 August 2020. The following day, Jacobs was informed by his health provider that he had tested positive for COVID-19. He then telephonically notified the company of the result. Jacobs had direct contact with several employees on 6 August 2020, potentially exposing them to the virus.

At the hearing, the employee contended that he had not received training on COVID-19 measures, nor was there any policy dealing with COVID-19 workplace protocols. As such, there was no rule and accordingly he had no knowledge of any rule. The company conceded that it did not have a written policy dealing with COVID-19. However, it argued that this did not mean that there was no rule about having to self-isolate in Jacobs' circumstances. The appropriate measures to eliminate COVID-19 were frequently advertised on television and radio. It was also accepted as a norm that if one came into contact with a person that was COVID-19 positive, that one would have to self-isolate. Furthermore, the company had verbally informed its employees that they should self-isolate should they be tested for COVID-19. Jacobs was well aware of the need to self-isolate as he had previously, in June 2020, self-isolated himself after coming into contact with a COVID-19 positive person.

The arbitrator accepted that the company may not have had rules or a policy in place dealing with measures to eliminate COVID-19. However, he found that some rules or standards were so well established that there was no need to communicate them. The COVID-19 protocols fell in this category. The arbitrator felt that Jacobs could not hide behind the fact that the company did not have a written policy, particularly considering the dangers of COVID-19 on the lives of ordinary people and how contagious the virus was. Furthermore, Jacobs had by his conduct in the past shown that he knew that he should self-isolate if there was a chance that he may have contracted the virus. Jacobs' dismissal was found to be substantively fair.

Different approaches to COVID-19 breaches in the workplace...*continued*

Manyike argued that the company had never inducted its employees into the consequences of not wearing a face mask properly, nor had it told them that not wearing a face mask properly would constitute an offence in terms of its disciplinary code.

A different approach was taken in the matter of *Numsa obo Manyike/Wenzane Consulting & Construction*. The Metal and Engineering Industries Bargaining Council decided that the dismissal of Mr Manyike, for pulling his face mask below his chin while conversing on his mobile phone was unfair. Manyike, a rigger, was already on a final written warning for the same offence when the incident happened.

Manyike argued that the company had never inducted its employees into the consequences of not wearing a face mask properly, nor had it told them that not wearing a face mask properly would constitute an offence in terms of its disciplinary code.

The company did not attend the arbitration hearing and the arbitrator unfortunately had only Manyike's version before him. The arbitrator considered that the purpose of discipline in the workplace is not punitive, but corrective and rehabilitative and that the company was obliged to show that Manyike could not have benefitted from corrective action. We point out that the arbitrator failed to consider that Manyike was already on a final written warning for the same conduct and would have been aware of the rule to keep his face mask on at all times whilst in the workplace.

The arbitrator accepted that within the context of COVID-19, not wearing a mask would constitute risky behavior. He, however, noted the ongoing debate about wearing face masks and the confusion in this regard. He found that the dismissal was too harsh and as such, it was substantively unfair. There were other alternatives short of dismissal that the employer could have imposed, considering Manyike's years of service and the negative financial impact of the dismissal will have on him. Manyike was reinstated but with no backpay.

Besides the dangers of not attending an arbitration hearing, the lesson to be learnt from especially the Manyike case is that employers should have in place COVID-19 policies or protocols which clearly set out the workplace rules for COVID-19 and the consequences of not following them. The absence of express rules may create confusion or ambiguity. As the Labour Court has held in the case of *Eskort v Mogotsi*, "*fancy*" COVID-19 protocols are not always sufficient. Employers need to take proactive steps to educate their employees and by implication, society at large about the realities of COVID-19.

Mbulelo Mango and Jose Jorge

KENYA

Employer denied the right to institute private prosecution proceedings

BIDCO's ex-employees were charged with the offence of stealing under Criminal Case No. 5906 of 20166.

Private prosecution, provided for under the Office of the Director of Public Prosecution Act 2 of 2013 (the ODPP Act), allows private citizens to privately prosecute where the court is satisfied that there has been a failure by the bodies charged with prosecution powers to carry out their mandate. Employers who are frustrated by the prosecution process in Kenya can initiate private prosecution proceedings.

It is important for employers to understand when and how they can initiate such proceedings. This was especially highlighted in the matter of *BIDCO Africa Limited vs Director of Public Prosecutions Criminal* Appeal 73 of 2019, where BIDCO Africa Limited's (BIDCO) appeal to initiate private proceedings was denied.

BIDCO's ex-employees were charged with the offence of stealing under Criminal Case No. 5906 of 20166. BIDCO sought to take over the prosecution of the criminal case on 30 April 2018, as the trial had not commenced since the pleas were taken in 2016. This application was dismissed in September 2019.

BIDCO appealed against the dismissal, on the grounds that the Director of Public Prosecutions (the DPP) had failed to institute criminal charges against the ex-employees despite the fact that there was sufficient evidence to institute criminal charges and as a result BIDCO had suffered immeasurable financial loss.

Section 28 of the ODPP Act provides for private prosecution. The courts in Kenya have expounded on this section by formulating principles that have to be met before a private citizen can proceed with private prosecution. These principles were highlighted in Floriculture International Limited and others, High Court Misc. Civil Application No. 114 of 1997 as follows:

a) the complainant must firstly exhaust the public machinery of prosecution before embarking on it himself i.e. affording the DPP a reasonable opportunity to commence/oppose the criminal process. In the matter of *Otieno Clifford Richard Vs. Republic, High Court at Nairobi Misc*. Civil Suit No. 720 of 2005 the application for private prosecution was denied, as the DPP had not issued a formal charge sheet;

b) that the DPP has taken a decision on the report and declined to institute the criminal proceedings; or that he has been unreasonably silent;

c) that the DPP's failure or refusal to prosecute is culpable and is without good reason;

d) that unless the suspect is prosecuted at the given point of time, there is a clear likelihood of a failure of public and private justice;

e) that the private citizen has suffered exceptional and substantial injury or damage, and that he is not motivated by, malice, politics, or some ulterior considerations devoid of good faith; and

f) that demonstrable grounds exist for believing that a grave social injustice is being allowed to persist and that private prosecution is an initiative to counter act the culpable refusal or failure to prosecute.

KENYA

Employer denied the right to institute private prosecution proceedings

...continued

This case highlights all the tenets of private prosecution. Employers should note that despite the availability of the remedy, it can only be used to initiate proceedings where there has been refusal by the DPP to commence prosecution and not to take over proceedings that have already commenced.

The DPP opposed the appeal by relying on the case of *Rufus Ribblebarger vs Brian John Robbson* (1959) which provided that private prosecution can only be allowed by the court if the private prosecutor can prove that that the private proceedings are necessary because the DPP does not wish to act on the complaint, and that they have declined to act or refused to take action, for culpable reasons.

The court took the position that the case commenced from the moment the accused took their pleas. Therefore, there was no denial or failure to act on the part of the DPP. The court further held that under the Constitution of Kenya, prosecutorial power is vested in the DPP and once the DPP has commenced prosecution, under Article 157(10) of the Constitution, the DPP cannot be directed in the exercise of its prosecutorial powers.

This case highlights all the tenets of private prosecution. Employers should note that despite the availability of the remedy, it can only be used to initiate proceedings where there has been refusal by the DPP to commence prosecution and not to take over proceedings that have already commenced. If an employer is frustrated by the DPP in an ongoing criminal case, it should consider initiating separate civil proceedings against its former employee for the harm done.

Njeri Wagacha, Desmond Odhiambo and Rizichi Kashero-Ondego


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POPI AND THE EMPLOYMENT LIFE CYCLE: THE CDH POPI GUIDE

The Protection of Personal Information Act 4 of 2013 (POPI) came into force on 1 July 2020, save for a few provisions related to the amendment of laws and the functions of the Human Rights Commission.

POPI places several obligations on employers in the management of personal and special personal information collected from employees, in an endeavour to balance the right of employers to conduct business with the right of employees to privacy.

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EMPLOYMENT

RETRENCHMENT GUIDELINE

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OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:

Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

Imraan Mahomed
Director
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com

Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com

Anli Bezuidenhout
Director
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com

Bongani Masuku
Director
T +27 (0)11 562 1498
E bongani.masuku@cdhlegal.com

Hedda Schensema
Director
T +27 (0)11 562 1487
E hedda.schensema@cdhlegal.com

Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com

Phetheni Nkuna
Director
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com

Njeri Wagacha
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com

Gillian Lumb
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com

Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com

Mohsina Chenia
Executive Consultant
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:

Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com

Sean Jamieson
Senior Associate
T +27 (0)11 562 1296
E sean.jamieson@cdhlegal.com

Rizichi Kashero-Ondego
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com

Jean Ewang
Consultant
M +27 (0)73 909 1940
E jean.ewang@cdhlegal.com

Tamsanqa Mila
Senior Associate
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com

Jordyne Löser
Associate
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com

Avinash Govindjee
Consultant
M +27 (0)83 326 5007
E avinash.govindjee@cdhlegal.com

Asma Cachalia
Associate
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com

Christine Mugenyu
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E christine.mugenyu@cdhlegal.com

Riola Kok
Professional Support Lawyer
T +27 (0)11 562 1748
E riola.kok@cdhlegal.com

Jaden Cramer
Associate
T +27 (0)11 562 1260
E jaden.cramer@cdhlegal.com

Peter Mutema
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E peter.mutema@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
CVS Plaza, Lenana Road, Nairobi, Kenya. PO Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA