

## **Employment Law Department E-mail Flyer – August 2008**


### **National Mass Protest Action – Are Employers Ready?**

Following closely on the heels of regional stay - aways, COSATU have called for nationwide protest action on the 6<sup>th</sup> August 2008 in what is believed will bring the country to a standstill. The call for mass protest action is against the rising fuel and food costs as well as job losses caused by the electricity crisis. Section 77 of the Labour Relations Act ("LRA") permits protest action to promote or defend socio-economic interests of workers and COSATU are therefore within its rights in this regard.

In terms of section 77 (3) of the LRA, employees are protected against dismissal or any other disciplinary action during mass protest action. Employees should however be warned that any absences related to the mass protest action may be treated on the basis of no work, no pay.

Now is the perfect time for employers to commence a review on existing contracts, policies and procedures. Employers would be well advised to agree with negotiating parties that employees who participate in legal mass protest action or planned stay - aways and are absent from work will be obliged to make up the lost time. This can be done by agreeing that overtime or work on weekends to make up for ordinary hours as a result of absence due to protest action, will be paid at ordinary rates.

Employers are also warned of the possible stay - aways on the 4<sup>th</sup> and 5<sup>th</sup> August in support of Jacob Zuma who will be appearing in the Pietermaritzburg High Court in an attempt to have the National Prosecuting Authority's decision to prosecute him declared unconstitutional. Taxi associations have indicated that they will not be operating on the 4<sup>th</sup> August in solidarity with Zuma. Employers are advised to arrange alternative transport to and from work for those



employees who are willing to tender their services but are unable to do so due to the transport disruption.

These are tough times for business and employers will feel the pinch in the first week of August. Employers are therefore advised to ensure that they have the right processes in place to deal with all eventualities. All areas of business that may be affected by the disruption of both the mass protest action and Zuma's trial must be identified and the necessary contingencies put in place.

Siobhan Viljoen

**Racial discrimination cannot be inferred it must be proven.**


The inconsistent application of disciplinary action all too often renders an employee's dismissal substantively unfair, when in fact the employee is guilty of the misconduct in question. This was the case in *Raol Investments (Pty) Ltd t/a Thekwini Toyota v Madlala* 2008 (1) SA 551 in which the Supreme Court of Appeal (SCA) not only had to decide whether the employer had been inconsistent in the application of discipline, but it had to do so within the context of racial discrimination.

Madlala's superior, Van Rooyen, accidentally drove over Madlala's foot in the parking lot. Van Rooyen did not stop to assist Madlala but continued driving and parked his car, upon exiting his vehicle Van Rooyen called out an apology to Madlala and proceeded to his office. The next day Van Rooyen came across Madlala, words were exchanged and Madlala assaulted Van Rooyen. Van Rooyen punched back.

Van Rooyen reported the incident, a disciplinary enquiry was held and Madlala was dismissed. Madlala, was previously assaulted by a white co-worker, Ferreira, but did not lodge a grievance. A disciplinary enquiry was not held and Ferreira was simply given a warning. Having been dismissed, Madlala argued that there had been inconsistent application of discipline.

The Labour Appeal Court (LAC) found that Madlala's dismissal was unfair by virtue of the inconsistency of treatment between himself and Ferreira. The LAC also found that Madlala's dismissal was automatically unfair because the inconsistent treatment was racially based.

The LAC reasoned that because there was disparity in treatment that was not justified, it was self evident that the employer had also discriminated against Madlala on the grounds of his race. However the SCA rejected this reasoning and held that the question whether an employer has



discriminated against an employee on the grounds of race, is a question of fact which must be established by means of evidence. The SCA further held that Court must not be too hasty to conclude that an employee has been discriminated against on grounds of race merely because differentiation of treatment coincides with racial difference.

The SCA found that the disparate treatment of Madlala and Ferreira was not on the grounds of race but rather because Ferreira had lodged a formal complaint whereas Madlala had not. In these circumstances the court could not find on the facts that the employee had been discriminated against on the basis of race.

Melisa Quattrocchi

### **Late remuneration – Employees cannot take the law into their own hands**

Many employees face the common problem of not being paid their remuneration timeously by their employers. This position was recently considered in the Port Elizabeth CCMA in the case of *Coyle-Dowling and Midcoast Leisure CC t/a Midcoast Boards (2008) 17 CCMA 8.34.3*.

Here a frustrated employee, decided to set up a business in competition with his employer as a result of late and underpaid remuneration from his employer. A disciplinary enquiry was convened and the employee was subsequently dismissed.

The employee claimed that because the employer had not paid him timeously and often underpaid him, the employer had breached the terms of the employment contract. The employee also claimed that his dismissal was procedurally unfair as the chairperson overseeing the disciplinary enquiry relied almost exclusively on hearsay evidence.

The employee was charged with breach of trust, gross dishonesty and insubordination. The employer alleged that the employee had contacted existing suppliers, business associates and competitors of the employer with the intention of promoting his private business operation. The employer also alleged that the employee concluded various fraudulent transactions.

At the CCMA the employer argued that the trust relationship between the parties had irretrievably broken down thereby rendering the employment relationship intolerable.



The commissioner accepted that there is "a duty that rests on the employee to devote his time, skill and energy to furthering the interests of the employer's business" which the employee clearly failed to do.

The commissioner dismissed the application and held that although the employer failed to pay the employee timeously, the employee's choice to set up a competing business using the employer's resources was not the correct remedy. The dismissal was therefore found to be for a fair reason.

Cherie Vere

### **Labour Court of High Court? The Confusion Continues**

A recent Eastern Cape High Court decision, *Mkumatela v Nelson Mandela Metropolitan Municipality & Another* [2007] JOL 21686 (SE), makes it clear that employees of state organs can approach the High Court or the Labour Court when they allege that they have been unfairly treated by their employer.

It should be borne in mind that Langa CJ had noted in the Constitutional Court judgment of *Chirwa v Transnet Limited & Others* that there is no reason to afford employees of the State more protection than employees of the private sector.

However in the case of *Mkumatela*, the applicant was aggrieved when he was not appointed after he unsuccessfully applied for a promotion at the municipality where he was employed. He applied to the High Court to have the decision reviewed. The Municipality alleged that the Labour Court had exclusive jurisdiction to hear the dispute and that the applicant should have brought his application in terms of the Labour Relations Act. Instead the Applicant relied on his constitutionally protected right to just administrative action in terms of section 33 of the Constitution and stated that the Municipality had failed to exercise public power in implementing a policy document.

The Judge said that the municipality was engaging in administrative action when it embarked on the promotion of employees and thus exercises a public power when doing so. She stated that it was performing an administrative act when implementing its policies and this meant that the High Court had the jurisdiction to entertain the review of the administrative action. In her opinion a



state employee has the choice as to which court he wishes to approach if an unfair labour practice has been committed against him.

Whether this state of affairs is what was envisaged by the *Chirwa* judgment remains to be seen. It seems clear to us that the Constitutional Court is very eager to see labour disputes being resolved in the specialised forum of the Labour Court. The *Mkumatela* decision allows State employees to decide whether they wish to follow an administrative law remedy or labour relations remedy and flies in the face of the pronouncements of the Chief Justice that State employees should not have additional remedies that are not open to private employees. Further developments will be watched with interest.

Verlie Oosthuizen

The text of this flyer is also contained in an attachment in MS-Word 97 format. To be removed from or added to this mail list contact [vanderwalt@wylie.co.za](mailto:vanderwalt@wylie.co.za)

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