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1. Current Affairs

Those of you who attended our breakfast seminar at the beginning of the year heard us describe 2009 as the year of the strike. This has proved to be correct.

High inflation, expectation from the workforce, a change in political leadership has, in our opinion, all led to the number of strikes experienced in industries across the board. The 2010 projects make it ideal for strikers to exert economic pressure on employers but it seems every industry is having it's turn in having to deal with strikes in support of wage demands.

The current wage demands amongst COSATU affiliated unions all appear to be double-digit wage demands. Employers are caught in this dilemma as they are faced with reduced order books and a fairly bleak forecast for the future. Employees on the other hand are usually negotiating off a low wage base and are faced with the spiralling cost of living and increased inflation.

Those clients who think that the union and their employees will reduce their demands because of the poor economic conditions have been rudely awakened.

The full impact of Eskom increasing its electricity tariff by 31.33% is still to filter its way through the economy and there is little doubt that this will in itself become a very strong bargaining point.

Unfortunately employers have also had to experience violence and intimidation that has become the norm in strikes and are happy to point out that the Labour Courts have not hesitated in interdicting any unlawful behaviour.

It is for this reason that we urge clients to ensure that their strike contingency plans are updated and, if appropriate, picketing rules are defined and agreed.

Labour brokers or "temporary employment services" as they are referred to in the Labour Relations Act, are in the hot seat at the moment. Since the end of last year, when the Minister of Labour Membathisi

Madladlana stated that labour brokers would be banned, there have been mixed responses regarding whether or not this should be done. The Minister is determined to address these problems and is currently debating this and it is clear that unions are very opposed to the use of labour brokers. On the other hand there is the strong argument that labour broking forms a material part of our economy and it would be in everyone's interest if they remain albeit in a regulated environment. This does seem like the prudent way forward.

However the Minister has attacked the discrepancy between what employees engaged through labour brokers receive and what directly hired employees receive with regards to remuneration and benefits. Recent research funded by the Department of Labour has shown that employees engaged through labour brokers earn significantly less than those hired directly by employers, despite them performing the same job. The Minister has also labelled labour broking as "a form of human trafficking" where "companies 'sell' the labour of workers to the highest bidder". In early August this year, the Minister stated that the main aim of this attack on labour brokers was to ensure that both groups of employees had the same rights and protection afforded to all employees.

The topic is a political hot potato and we will keep you advised of developments.

For more information, please contact Michael Maeso or Cherie Vere on maeso@wylie.co.za or vere@wylie.co.za.

2 Delays in the Labour Courts: Judges under fire

One of the most serious problems in any litigation is the amount of time that it takes for the parties to reach a result. Often it will take in excess of five years for a matter to reach finality. By then, many thousands of Rands have been paid and often the people who were originally involved have forgotten the circumstances of the incident or have moved on from the company. The Labour Relations Act 1995 ("the LRA") was designed to encourage the speedy resolution of disputes, however, it seems that the Labour Courts, and some of the officials and staff that man them, forget this important consideration.

In the recent Constitutional Court judgment of Strategic Liquor Services v Mvumbi N.O & others [2009] ZACC 17 the Court was critical of the delays that are occurring in the resolution of labour disputes in the Labour Courts. In that case the dispute in the workplace had arisen in 2004 and the CCMA proceedings had taken place in October that year. Following unsuccessful review proceedings and appeals the case was only finally decided (in the employee's favour) in June 2009 – some five years later. Clearly this is not what the drafters of the LRA had in mind.

Whilst the Court in this case found that the employer's case was "misconceived" and that there were no grounds to overturn the 2005 decision of the CCMA commissioner, they were sharply critical of the Labour Courts conduct in the matter.

The Constitutional Court set out the long, sad history of the case and the Labour Court's failure to furnish reasons in the review application, despite repeated requests by the employer party. The review was only heard two years after the CCMA hearing and the judge dismissed the review without providing reasons for his decision. An application for leave to appeal by the employer, some 10 months later, was dismissed by the same judge without ever furnishing his reasons for dismissing the review or his reasons for dismissing the leave to appeal.

When the employer appealed this decision at the Labour Appeal Court, it took a year to deal with the application and dismissed it without furnishing reasons either.

When the case finally reached the Supreme Court of Appeal it managed to deal with it in two months. Even though they were not required to furnish reasons, as an exception they did so as they were troubled by the "poor judicial service meted out to the employer." They had to dismiss the application as they still had not seen the Labour Court judge's reasons for the dismissal of the review. The SCA was the first court to tell the employer why it was dismissing its case.

The Constitutional Court and the SCA have been critical of "deplorable" and "lamentable" delays that were mostly due to the fault of the Labour Courts' management of the case. It noted that the SCA has had to deal with appeals from the Labour Appeal Court where it has taken from 15 months to two years and a half years for a judgment to be delivered after oral argument was heard.

The Constitutional Court also noted that litigants are entitled to reasons for any court's decision and that written reasons are "indispensable". They described a failure to supply them as "a grave lapse of duty, a breach of a litigant's rights and an impediment to the appeal process". Although written reasons are not required in terms of the Court's rules the Constitutional Court has shown that they are indispensable to the appeal process. It has even been suggested that withholding reasons is tantamount to violating an individual's constitutional right of access to the courts.

Whilst it is encouraging to know that the frustrations that labour practitioners, and the public, experience with the Labour Courts have been noted by the Constitutional Court, we anticipate that the delays will continue. Litigation is never a "quick fix" and it may be many years before finality is reached in any dispute before the courts. Parties to a dispute need to always be aware of the risks and the expense they expose themselves to when contemplating litigation.

For more information, please contact Verlie Oosthuizen on 031 302 0267 or oosthuizenv@wylie.co.za.

3. To what extent must an employer consider mitigating factors when deciding upon an appropriate disciplinary sanction?

The CCMA and Labour Courts have had an interesting time, giving meaning to the Constitutional Court's judgment of Sidumo v Rustenberg Platinum Mines and in applying the principles laid down by this watershed case. One of these principles in determining the appropriateness of a disciplinary sanction is the existence of mitigating factors. This article focuses on an employee's length of service as a mitigating factor.

There have been a long line of Court decisions which all say, more or less, that theft by an employee irrespective of the value of the item stolen justified dismissal. There has been a major shift in the law and the 2008 decision of the Labour Appeal Court ("LAC") in Shoprite Checkers v CCMA has radically challenged this position, and set what is in our opinion a dangerous precedent. In this case the employee was found guilty of theft of goods in the amount of roughly R20, and the employee was dismissed. The aggrieved employee pursued litigation starting in the CCMA and worked his way through the Court structures. The LAC held that the Labour Court's decision to reinstate the employee without back pay was too severe in light of the value of the item stolen, the employee's 30 years of service and unblemished disciplinary record. The LAC imposed a final written warning whilst reinstating the employee retrospectively.

Another case for concern is the 2008 case of the Labour Court in the Department of Health, Eastern Province v PHWSBC an employee was guilty of having fraudulently completed an application form indicating that he had been interviewed and recommended for appointment to a promotional post.

At his disciplinary hearing, he pleaded guilty, expressed remorse, and claimed that he had acted in desperation as a result of his employer's persistent refusal to recognise his efforts. The employee was dismissed and referred a dispute to the relevant bargaining council.
The employer was not innocent in all of this. The employer had treated the employee very unfairly, it had contravened its workplace rules by allowing the employee to act in a higher position without recognition or compensation, the employer also failed to comply with an order of Court compelling the employer to advertise the position of senior administrative officer. On review the Court agreed with the reasoning of the arbitrating commissioner's in holding that that the employers conduct along with the employee's length of service was found to constituted compelling mitigating circumstances operating against the employee's dismissal. In applying the principles enunciated in Sidumo the Labour Court found that the CCMA award was reasonable, and ought not to be interfered with.

These cases send our a clear yet disturbing signal to employers, that before dismissing an employee, mitigating factors especially length of service, must be thoroughly debated and if rejected water tight reasons must be provided as to why this is so.

For more information, please contact Melisa Quattrocchi on 031 302 0280 or quattrocchi@wylie.co.za

4. Employees refusing to undergo a polygraph?

The admissibility of polygraph tests as evidence at arbitrations has always been an area of contention especially where it appears that employers may be treating the polygraph testing as a means of intimidating staff and extracting confessions. An analysis of CCMA cases over the years demonstrates how commissioners have grappled with the admissibility of polygraph evidence at arbitrations. The Statutory Council for the Printing, Newspaper and Packaging Industries recently had to determine in the matter of CEPPAWU obo Modjadji & Others v Altech Namitech (Pty) Ltd (2008) 11 BALR 1013 (SCPNPI) the fairness of a dismissal where the employees were dismissed for refusing to undergo a polygraph test.

It is a well established principle that employees are within their rights to refuse a polygraph test and employers seem to have responded to this by including clauses in employment contracts that oblige employees to submit to polygraph testing on demand. Failure to submit to such a test may then constitute a breach of contract.

The Company in this matter works with highly confidential encrypted data. After the loss of millions of Rands in theft and the possibility of losing one of their biggest clients, the Company undertook to investigate the theft. Those employees suspected were requested to undergo a polygraph test. The three applicants in this matter refused to undergo a polygraph and as a result the Company immediately suspended them and charged them with breach of their terms of employment by virtue of their refusal to undergo the polygraph test. The employees were at no stage charged with theft. The Chairman of the internal disciplinary enquiry found that there was a contractual obligation to undergo the polygraph, and that due to their refusal, the applicants had breached their duty of good faith and could no longer be trusted. The Company alleged that all three employees had agreed in their contracts of employment to polygraph testing on demand.

The CCMA found that the Company was incorrect to charge the applicants with only refusing to take a polygraph test and that it cannot stand as a charge on its own. Although the Commissioner recognised that while the refusal to undergo a polygraph test may be a form of breach of contract, or possible insubordination, it does not in itself justify the conclusion that such a person can no longer be trusted. The Commissioner raised issue with the fact that the Company did not hold an investigation into the actual theft and the involvement of the applicants. It chose, rather, to limit its "enquiry" to the polygraph and the failure to undergo the test to conclude that the applicants cannot be trusted.

Clients are cautioned against exclusively charging employees with the refusal to undergo a polygraph test even where such refusal may constitute a breach of contract to avoid an unfair dismissal claim. Employers can, however, where evidence exists of misconduct use the fact that the employee refused to undergo a polygraph test as an aggravating circumstance where the employer can show reasonable grounds for the loss of trust, but it cannot be a disciplinary offence in itself.

For more information, please contact Siobhan Viljoen on 031 302 0431 or viljoen@wylie.co.za.

5. Retirement Fund Death Benefits

The Financial Services Laws General Amendment Act, 2008, significantly amended the acceptable methods of payment of death benefits arising as a result of the death of a member of a retirement fund in terms of Section 37C of the Pension Funds Act, 1956.

The most common discretion which the relevant decision-maker will now have to exercise, when deciding on the most appropriate method of payment of a death benefit, will be payment to a caregiver versus payment to a beneficiary fund (a concept introduced by the amending Act). This discretion will have to be exercised by a relatively broad spectrum of people who are members of boards of trustees or death benefit sub-committees. Some of these members may lack the expertise necessary to exercise a discretion which will ultimately be in the beneficiary's best interests. The following principles should therefore be considered by these persons in detail in order to ensure that a satisfactory conclusion is reached regarding the method of payment of a death benefit:

1. The amount of the benefit – the higher the amount of the benefit, the more onerous the duty on the board to ensure that measures are put in place for the proper care and administration of the amount. At the same time, the lower the benefit, the more cost effective to pay to the caregiver directly.

2. The ability and qualifications of the caregiver to administer the financial affairs of the beneficiary - with specific reference to other factors such as: the level of education of the caregiver, the financial literacy of the caregiver, the ability of the caregiver in practice to manage his/her own financial affairs; the caregiver's occupation, the caregiver's personal income and financial independence; the caregiver's credit record and general credit worthiness; the assets which the caregiver has acquired.

3. The health of the caregiver - if the caregiver is terminally ill and likely to die shortly after the allocation is made to the minor child, then the benefit should be placed in a beneficiary fund so as

to avoid the death benefit payment falling into the deceased estate of the caregiver and being allocated among the caregiver's heirs (which may not include the minor child).

4. The need for the benefit to continue to provide for the minor beneficiaries right until the minor/s reach majority - the Pension Funds Adjudicator has previously taken cognisance of the fact that greater interest and return can be earned on the death benefit if invested privately by a guardian. In this scenario, the board of trustees must consider the responsibility and experience of the guardian in selecting and maintaining such an investment. There may exist a need to protect a small portion of a large benefit for a future contingency where the minor beneficiary is relatively young.

5. Preference should be given to paying the caregiver - there is case law to the effect that a guardian has a common-law right to administer monies on behalf of his/her legal ward (the minor child). The caregiver should only be deprived of this right where it is clear from an investigation conducted by the board of trustees that the caregiver is neither qualified nor competent to administer monies on behalf of the minor.

It must also be borne in mind that a decision regarding the method of payment of a death benefit can be challenged in a court of law or similar forum (such as the Office of the Pension Funds Adjudicator). It is therefore very important for the relevant decision making body to keep a written record of the deliberations which lead to the exercise of this discretion. It will prove much easier for the decision-maker to justify his or her decision and likewise, the reasoning applied for reaching such a decision, based on a written record of the decision-making deliberations.

For more information, please contact Carlyle Field on 031 302 0223 or field@wylie.co.za.

We will be having an informal seminar over drinks and snacks in November. We aim to discuss the latest law relevant to strikes and strike dismissals as well the somewhat confusing section 189 A and its implications.

Please let Michael Maeso know if there are any other subjects you wish us to consider.

Seats will be limited.

Contact details:

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