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Articles and Recent Cases:

- 1. Union Activities**
- 2. Restraint of Trade and the Constitution**
- 3. Public Holidays**
- 4. Operational requirements and work performance – guidelines in the workplace**

We trust that you will find the content of this email flyer to be of interest.

1. Union Activities

Soon after our breakfast seminar, two articles appeared in the press supporting our view on union activities for 2008.

The Business Report confirmed that the National Union of Mine Workers ("NUMSA") had met with the FIFA President to discuss problems faced by construction workers employed at the Stadia throughout South Africa. Complaints included issues surrounding the use of sub-contractors as well as Health and Safety. As indicated at our breakfast seminar, those organisations linked to World Cup deadlines in 2010 are likely to deal with a number of union demands in the forthcoming period.

NUMSA have also launched their own probe into the blast at Associated Manganese Mines of South Africa and is clearly pushing Health and Safety issues.

Increased inflation will also inflate wage demands – be warned!

2. Restraint of Trade and the Constitution

Restraints of trade have recently become before our courts with mixed results.

In *Advtech Resourcing (Pty) Ltd t/a The Communicate Personnel Group vs Khan & Another* [2007] 4 ALL SA 1368 (C), a personnel recruitment agency specialising in placing individuals in the IT and engineering fields had an employee, Khan, leave to become a consultant in the IT recruitment field. Advtech alleged that Khan was operating in the same industry and was in breach of her restraint. Khan attempted to differentiate her new employment saying that she now specialised in placement in all fields of the employment market and was not focusing on IT and engineering.

The Judge confirmed that a restraint of trade can only be enforced if it protects some proprietary interest. This interest may take the form of trade secrets, confidential information, goodwill or trade connections. True to form, the learned Judge referred to the Constitution and the freedom to contract. He emphasised that the Court will not enforce agreements that are contrary to public policy. He held that part of the test for reasonableness of a restraint involved a proportionality enquiry. In this case, the Judge found that the restraint was so wide that the agreement was rendered unenforceable. The Court would not redesign the restraint and develop an entirely different contract. On these facts, the Court concluded that there was insufficient evidence to justify any protectable proprietary interests that would trump Khan's right to continue to work in her chosen field. The application was accordingly dismissed with costs.

In the case *Hirt & Carter (Pty) Ltd vs Mansfield & Another* [2007] 4 ALL SA 1423 (D) Mansfield and Others had been employed by Hirt & Carter in the photographic department. Hirt & Carter alleged that on leaving their employ, Mansfield and Others were in breach of their restraint because they were competing in relation to:-

1. performing photographic work in the advertising field,
2. soliciting business for photographic work from customers of Hirt & Carter,
3. utilising information obtained whilst employed by Hirt & Carter, including utilisation of technology, business contacts and knowledge of client's requirements.

Despite a recent decision to the contrary, the Judge accepted that the party contesting the validity of the restraint bears the onus to prove that it is unreasonable and reasonableness will be judged by public policy. Mansfield and Others argued that customers would use a photographer for his own personal style and not his connections.

The Court emphasised that if the reasons for enforcing the restraint was to discourage or eliminate competition, the restraint would be unenforceable.

Hirt & Carter failed to establish that there was anything secret or confidential about the information which existed in respect of their business where it involved photography. They could not show that the technology or methodology used was something that was unique and peculiar to it and not in the public knowledge. The Court concluded that the restraint was directed solely against competition and held it to be against public policy and unenforceable.

One can see that the courts will look closely at what it is being protected by the restraint of trade. Employers are warned to ensure that they have something unique and worthy of protection before contemplating litigation.

3. Public Holidays

The 2nd May 2008 has been declared a public holiday – Gazette No: 30900 Notice No. 7. Regulation Gazette No: 8857 Date 20.03.2008.

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4. Operational requirements and work performance – guideline in the workplace

It is not an unusual situation where an employer embarks on a retrenchment or a restructuring process, where as a result of its employees' poor performance the operational requirements of an employer necessitate a reduction in the workforce. When the 'restructuring' occurs the dismissed employees are invited to apply for positions in the new organisation and employees identified as poor performers are frequently not appointed.

The Labour Appeal Court has laid down clear guidelines on how to deal with this situation in the case of *SAA v Bogopa & others* (2007) 16 LAC 5.3.4. The employer (SAA) dismissed its in flight service department as a restructuring was required. The employer advised that it intended to fill the new positions using the criterion of "best competency fit".

A new organisational structure was formed and some people were assigned positions, without having to apply. Some employees were understandably disgruntled by the arrangement and did not hesitate to express their disapproval to the line manager. These employees were put on “administrative leave,” on the grounds of insolence and inciting colleagues at work. The dismissed employees were invited to apply for the new positions.

The employees were advised to make an appointment with a secretary if they wished to be consulted. They chose not to do so as it was clear that the employer had made the decision to dismiss before there had been any consultation with the employees.

The employer dismissed the employees for operational requirements at a time when there were vacancies the employees could have filled with minimal training. The employer could not justify its decision to require some employees to apply for posts while it had appointed other employees without insisting that they apply for the positions. The employer had breached the parity principle, that an employer should treat its employees equally or consistently when they are in the same circumstances.

The LAC reiterated that an employer should not, generally speaking, use procedures relating to operational requirements dismissal to solve problems relating to poor work performance of its employees. There are reasons why there are different pre-dismissal procedures in respect of the three categories of dismissal namely, misconduct, poor work performance and for operational requirements.

On the facts, the Labour Appeal Court concluded that the employer had no justification for insisting that the employees apply for the positions, having appointed certain employees without them having made an application. The LAC found that the dismissals were substantively unfair.

Employers are warned to remain vigilant and to follow correct procedure when embarking on retrenchments. Employers may not use retrenchment as a guise for dismiss employees who perform poorly, and finally if the decision is taken to retrench, employers must ensure that they treat all employees equally. .

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