Employment law update

Talita Laubscher *BIur LLB (UFS) LLM (Emory University USA)* is an attorney at Bowman Gilfillan in Johannesburg.

Dismissal related to a s 197 transfer?

The applicant in *Long v Prism Holdings Ltd and Another* [2012] 7 BLLR 672 (LAC) was employed as the first respondent's human resources director from 1 November 1998. On 3 July 2006 the second respondent, Net 1 Applied Technologies SA Ltd (Net 1), acquired the entire issued share capital of the first respondent, Prism Holdings Ltd (Prism). Thereafter, Prism and Net 1 remained separate legal entities. One Chalmers was the group human resources manager of Net 1, a position he held from 1 April 1998.

Prism was involved in the business of electronic payments and had a number of major retailers as customers. Net 1's major business was Cash Paymaster Services, which was contracted by the government to pay social grants.

Net 1's acquisition of Prism would enhance its business as, after the acquisition, its smart cards could be used at major retailers. Net 1's cardholders would therefore be able to make purchases at all major retailers using Prism's technology. Net 1 was about five times the size of Prism and had about 2 000 employees, whereas Prism had about 280 employees.

After the acquisition of Prism, a process of integration and restructuring followed. The reason for this was that certain business units, such as human resources, were duplicated in Net 1 and Prism and these had to be integrated. In particular, the respective positions held by one Long and Chalmers had to be merged.

On 20 September 2006 Chalmers circulated a memorandum containing a proposed new group structure to all employees. Each staff member was invited to comment and make proposals on the structure by 29 September 2006. Chalmers was reflected as the group human resources manager in the proposed structure. Long's name did not appear in the proposed structure.

On 22 September 2006, at the suggestion of Prism's chief executive officer, Long submitted his curriculum vitae to the head of finance, in which he set out his experience and functions as human resources manager at Prism.

On 5 October 2006 the executive committee confirmed the structure, which was communicated to staff after certain amendments had been effected. Again, Long's name was not reflected in the structure. On 9 October 2006 Chalmers circulated a memorandum to the staff at Prism advising that, as part of the integration and restructuring process, Prism's head office would be closed and the Prism staff who could be accommodated in the new Net 1 structure would be moved to Net 1's offices. Those who could not be accommodated faced the possibility of retrenchment

or of being placed elsewhere in the Net 1 group.

On 10 October 2006 Chalmers, Long and the head of finance, had a meeting at which Long presented his curriculum vitae and commented on Chalmer's memorandum. They did not discuss Chalmer's selection as human resources manager, as Long felt that this would not be appropriate in Chalmer's presence. The head of finance testified that, by this date, Chalmers had already been appointed as the new human resources manager and that it was inevitable that Long would not be appointed to this position, but would be retrenched. Subsequent to further exchanges, on 9 November 2006 Chalmers wrote to Long and explained why he (Chalmers) had been appointed as human resources manager. Long replied by stating that he accepted that only one head of human resources was required, but he objected to the manner in which Chalmers had been selected for the position.

On 15 November 2006 Long received a notice of his retrenchment, effective from 15 December 2006. On 12 December 2006 Long referred an unfair dismissal claim to the Commission for Conciliation, Mediation and Arbitration. Conciliation was unsuccessful and the matter was referred to the Labour Court. Long contended that his dismissal was automatically unfair because he was dismissed as a result of a transfer of a business as a going concern; alternatively that his dismissal was unfair for failure to comply with the provisions of s 189 of the Labour Relations Act 66 of 1997. He asked for reinstatement, alternatively compensation.

The Labour Court dismissed Long's claim with costs and he appealed to the Labour Appeal Court (LAC).

The LAC, per Sandi AJA (Waglay DJP and Davis JA concurring) noted that it was common cause that Net 1 had acquired all the shares in Prism and that the two had remained separate legal entities. Net 1 did however exercise control over Prism and designed its policies. The question was whether this amounted to a transfer of a business as a going concern for purposes of s 197 of the LRA. The LAC held that it did not. It referred to *Ndima and Others v Waverley Blankets Ltd* [1999] 6 BLLR 577 (LC), in which it was held that 'the transfer of possession and control of a business' are two separate concepts. The court also referred to the following by Todd *et al*:

'[T]he old and the new employers must be two separate entities. It is for this reason that the section will not apply where control of the business is transferred by way of a share transfer. In such cases control is shifted, but the legal entity of the employer remains the same' (C Todd, D du Toit & C Bosch *Business Transfer and Employment Rights in South Africa* (Durban: LexisNexis Butterworths 2004)).

The LAC accepted that Long was dismissed for operational requirements and not because of a transfer of a business as a going concern. The automatically unfair dismissal claim accordingly had to fail.

The LAC also rejected Long's claim that his retrenchment was substantively unfair. It

observed that: ‘As the circumstances of the present case demonstrate, in the majority of cases acquisition of one entity by another invariably results in the integration and restructuring of the workforces. In that process, some employees become redundant, unless alternative employment can be found for them. If this cannot be achieved, their dismissal for operational reasons is unavoidable.’

On the evidence, the court was satisfied that the integration of the business units was necessary and the duplication of the functions at Prism had to be eliminated if Prism was to be financially viable. Only one human resources manager was required, which Long conceded. The court was further satisfied that Chalmers was the right person for the job and that there were no alternative positions available for Long, save for the position of human resources manager falling under Chalmers, which he refused to accept.

The LAC, however, held that Long’s dismissal was procedurally unfair. It held that it was significant that Long did not comment, object or make a counter-proposal when he was invited to do so at the time the new structure was proposed. All he did was to submit his curriculum vitae to the head of finance. At that time, he did not make any comment about Chalmers being proposed as the new head of human resources. Even after publication of the structure in November 2006, Long did not make any move to object or challenge Chalmer’s appointment. He only did so after he was told that there were no positions available for him in Net 1’s international operations.

Nevertheless, Prism was required to consult with Long before Chalmers was appointed, in particular on the selection criteria that would be applied to select the new human resources manager. For this failure, Prism was ordered to pay Long an amount equal to three months’ remuneration and to pay 50% of his costs on appeal as well as in the Labour Court.

Moksha Naidoo *BA (Wits) LLB (UKZN)* is an advocate at the Johannesburg Bar.

Changing ‘traditional views’

Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others (LAC) (unreported case no JA78/10, 24-7-2012) (Tlaletsi JA)

The first respondent employee was dismissed for charges related to unauthorised absenteeism and gross insubordination in that she acted against her manager’s instructions when taking time off.

The second respondent arbitrator found the dismissal substantively unfair and reinstated the employee without back pay. The employer launched a review application at the Labour Court, which was dismissed. The appellant employer then turned to the Labour Appeal Court (LAC).

History

At the time of her dismissal, the employee had eight years' service with the employer and occupied the position of chef de partie.

To accommodate her request to attend a traditional healer's course, the employee's scheduled shifts changed to morning shifts only. Soon thereafter she requested a full month's unpaid leave to attend a sangoma course.

Her manager was willing to accommodate the employee on condition that she draw from her leave days while attending the course. Once it was established that the employee had no leave days accruing to her, her manager offered her one week of unpaid leave.

The employee was scheduled to be off duty from 3 to 5 June 2007, however she did not report for work on 2 June or on 6 June, the day she was expected to return to work.

Prior to her first day in absentia, the employee left two notes for her manager. The first note read:

'This serves to certify that Johannah Mmoledi was seen by me on 13-01-07 and was diagnosed to have perminisions [sic] of ancestors.
He/she under my treatment from 13-01 to 8th July 2007.
He/she will be ready to assume work on 8-07-2007.'
The letter was dated and signed by a traditional healer on 31 May 2007.
The second note read:
'I hereby inform you of the graduation of the abovementioned patient. I am asking you to please give her days from the 4th of June to the 8th July 2007 to complete her initiation school final ceremony to become a traditional healer.'

The employee was subjected to a disciplinary inquiry, where she was found guilty and was dismissed for the charges referred to above.

Aggrieved by the dismissal, the respondent referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration. After an unsuccessful conciliation, the matter was arbitrated.

Arbitration

Both the employee and the traditional healer gave evidence at arbitration as to why the employee was absent, which included the averment that the employee's life would have been at risk had she not sought the healer's intervention.

In accepting this version, the arbitrator found that the employee had no choice but to seek the assistance of the healer and, as such, justified her absence despite it being contrary to her employer's instruction. The arbitrator further found that the employer did not suffer any irreparable harm due to the employee's absence. He accordingly awarded her reinstatement without back pay.

Labour Court

The matter came before Francis J at the Labour Court (with the citation *Kievits Kroon Country Estate (Pty) Ltd v CCMA and Others* [2011] 3 BLLR 241 (LC)). The employer raised several grounds on which it challenged the arbitrator's award, including the allegation that the award was not justifiable in relation to the reasons given for it and that there was no rational link between the evidence before the arbitrator and the factual considerations crucial to the award.
In his judgment, Francis J held:

'It is common cause that the [employer] knew that the [employee] was attending a course to become a sangoma. It had assisted her in the past to attend the said course. Arrangements were made with her to work morning shifts and to attend the course in the afternoons.
This was from February 2007 to May 2007. The [employer] was approached at the end of May 2007 for permission to take one month's unpaid leave to complete the training course. The [employer] refused, although the [employee] had produced a traditional healer certificate that was treated with contempt by the [employer]. The [employer] knew what the reasons were for the [employee's] absence. The duration of absence was going to be for a month. She had been working for the [employer] for eight years. The explanation tendered for her absence was to attend a sangoma course to appease her ancestors. This is not one of those cases where an employer did not know about the whereabouts of the employee. It was prepared to give her a week off as unpaid leave. The commissioner found that the explanation that she tendered was reasonable. This court cannot second-guess the commissioner's findings.'
The court concluded the award was one that a reasonable decision-maker would have made and dismissed the review application.

LAC

On appeal, among the grounds raised by the employer were:

• The Labour Court failed to find that, in enacting the Labour Relations Act 66 of 1995 and the Basic Conditions of Employment Act 75 of 1997 (BCEA), the legislature opted for a standard akin to a Western standard as opposed to African culture (for eg s 23(1) and (2) of the BCEA). Further, the arbitrator assumed the function of the legislature by elevating the role of traditional healers to medical practitioners.

• The Labour Court failed to find that the effect of the arbitrator's findings would open the floodgates to 'malpractices that operate towards turning the work environment into total disarray', in terms of which employees who subscribe to African traditions would diagnose themselves and, after a period of absence, hand the employer sick notes from traditional healers, forcing employers to accept these notes in the same way they would a medical certificate.

Section 23(1) and (2) of the BCEA read:

'(1) An employer is not required to pay an employee in terms of section 22 if the employee has been absent from work for more than two consecutive days or on more than two occasions during an eight-week period and, on request by the employer, does not produce a medical certificate stating that the employee was unable to work for the duration of the employee's absence on account of sickness or injury.
(2) The medical certificate must be issued and signed by a medical practitioner or any other person who is certified to diagnose and treat patients and who is registered with a professional council established by an Act of parliament.'

The LAC noted that the issue before the court was whether there was justification for the decision of the arbitrator on the material before him.

However, s 23 of the BCEA finds application in deciding whether or not an employee is entitled to remuneration when off sick. This, according to the court, was a separate issue. Having regard to this section, Tlaletsi JA said the following:

'In this case, the employee was not seeking any remuneration for the period when she would be away from work due to ill health. The common cause fact is that she requested to be accommodated by being given a month's unpaid leave to complete a process that she had already started. Section 23 of the BCEA, therefore, finds no application on the issue in this case. Similarly, the argument that by enacting section 23 of the BCEA the legislature in express terms opted for standards in line with Western standards as opposed to African culture is misplaced as well. I am, as a result, unable to find, as we are urged to do, that the commissioner usurped the function of the legislature by elevating the role of traditional healers to that of medical practitioners.'

The LAC began to address the employer's second argument by stating the following:

'It would be disingenuous of anybody to deny that our society is characterised by a diversity of cultures, traditions and beliefs. That being the case, there will always be instances where these diverse cultural and traditional beliefs and practices create challenges within our society, the workplace being no exception. The Constitution of the country itself recognises these rights and practices. It must be recognised that some of these cultural beliefs and practices are strongly held by those who subscribe [to] them and regard them as part of their lives. … The fact that the appellant's attorney does not believe in the authenticity of the culture and that no credible and expert evidence was presented to prove that the respondent was ill is, in my view, subjective and irrelevant.

A paradigm shift is necessary and one must appreciate the kind of society we live in. Accommodating one another is nothing else but “botho” or “ubuntu”, which is part of our heritage as a society.’

In respect of the fear of an increase in ‘malpractices’, the LAC reaffirmed the view that such an argument, in this context, had no merit. The possibility of abuse should not divest from the rights of others who hold sincere beliefs. Should the acceptance of a particular cultural practice encourage others to come out in support of that practice, which in the past they were afraid to do, then such a result should be celebrated and not feared.
The appeal was dismissed with no order as to costs as the court held that the issue raised in the matter was novel and the appellant did not act unreasonably in approaching the court on appeal.