Employment law update

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Arbitrations

The court in *Chabalala v Metal and Engineering Industries Bargaining Council and Others* [2014] 3 BLLR 237 (LC) held that the conduct of the second respondent arbitrator is an example of how an arbitration should not be run.

Chabalala was dismissed for gross misconduct on 1 April 2011 following a disciplinary inquiry into allegations that he had accused Mr Vas, his manager and owner of the company where he was employed, *inter alia*, of employing foreigners to replace existing workers and of hiring unknown persons to kill the workers. Chabalala contended that his dismissal was unfair and referred a dispute to the Metal and Engineering Industries Bargaining Council (MEIBC). The second respondent, Braam van Wyk, presided over the arbitration and held that Chabalala's dismissal was substantively and procedurally fair. Chabalala took the matter on review to the Labour Court on the basis that the commissioner had misconducted himself in the conduct of the proceedings to such an extent that he deprived Chabalala of a fair hearing.

With reference to *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as* amicus curiae) [2013] 11 BLLR 1074 (SCA) the Labour Court, per Snyman AJ, confirmed, first, that a review of an arbitration award is permissible if the defect falls within one of the grounds in s 145(2)(*a*) of the Labour Relations Act 66 of 1995 (LRA). Snyman AJ further confirmed that the Labour Court has a supervisory function over the Commission for Conciliation, Mediation and Arbitration (CCMA) and bargaining councils and as part of this function, the court should point out flaws for rectification. Considering the facts of the matter, the Labour Court held that commissioner Van Wyk had committed serious misconduct and thus that the award was reviewable. The misconduct was such that it contaminated the entire arbitration and there was a complete absence of fair arbitration proceedings.

In summary, commissioner Van Wyk committed misconduct as follows: At the start of the proceedings, he launched into a monologue of self-glorification that lasted for about four pages of the record in which he indicated why he was better than other commissioners with legal training because he 'came through the ranks' and did not 'inherit' his position from legal practice. In narrowing the issues in dispute, Van Wyk ascertained that Chabalala sought retrospective reinstatement. While Chabalala was busy cross-examining Vas, Van Wyk abruptly called a halt to the cross-examination and caused Chabalala to be sworn in to give evidence. Before Chabalala could even state his case, Van Wyk lambasted him with hostile and aggressive cross-examination on the

issue of reinstatement. He said, for example, that 'the employer says the relationship of trust … is gone ... does [Chabalala] think the employer is going to organise a big party with lots of champagne'. He then put it to Chabalala that reinstatement was inappropriate because there was 'no love lost' between Vas and Chabalala. In the end, solely because of the pressure exerted on him by Van Wyk and clearly having been bullied into doing so, Chabalala conceded that he rather wanted to be awarded compensation. Van Wyk proceeded to place the onus squarely on Chabalala to prove that his dismissal was unfair. In this regard, he explained that when he gave training to his managers at South African Airways, he would take his LRA and highlight chap 8 with different colours. He would, for example, highlight 'unfair' in red where it came to unfair dismissals, and if Chabalala wanted Van Wyk to award him compensation, then Chabalala would have to convince him that what had happened was unfair. When Chabalala tried to state a case, Van Wyk consistently interrupted him and subjected him to aggressive cross-examination, which included various propositions being put to Chabalala but not allowing Chabalala an opportunity to comment. When Van Wyk completed his cross-examination of Chabalala, he asked if Vas had any questions for him. Vas did not put any version to Chabalala and did not really cross-examine him. Not once was Chabalala given a chance to state a case.

Snyman AJ accepted that s 138(1) of the LRA permits a commissioner to conduct arbitration proceedings in a manner the commissioner deems fit. He held, however, that this does not give an arbitrator a licence actually to become engaged in the proceedings to such an extent that it becomes questionable as to whether the arbitrator is a representative of one of the parties. This section can also not be relied on to justify conduct that in essence deprives one of the parties of a fair hearing, which clearly is what happened in this case. The court accordingly held that Van Wyk acted unfairly, wrongfully and irregularly. It held that Van Wyk seemed to be 'a law unto himself' and this conduct severely damaged the credibility and integrity of the arbitration dispute resolution process under the LRA. In the circumstances, the award was reviewed and set aside. The court ordered that the matter be heard *de novo* before another commissioner, and that a copy of the judgment be forwarded to the persons responsible for case management at the MEIBC.

Fixed-term contracts

In *Public Servants Association obo Mbiza v Office of the Presidency and Others* [2014] 3 BLLR 275 (LC) Mbiza was employed in the Office of the Presidency as a housekeeping manager in the residence of the Deputy President, Ms Baleka Mbete. When his contract was terminated, he contended at the General Public Service Sectoral Bargaining Council that he had been unfairly dismissed. The employer argued that Mbiza had not been dismissed but that his contract had merely expired. The arbitrator held, however, that he was dismissed and that the dismissal was procedurally unfair but substantively fair because it was for a fair reason, namely incompatibility with Mbete. Mbiza applied for the review of the award and sought to have the finding of substantive fairness reviewed and set aside.

Mbiza was employed on a fixed-term contract that would have expired on 31 July 2009. However, on 8 December 2008 his manager informed him that his contract was terminated due to 'incompetence'. Two days later she informed him that the reason for the termination was not 'incompetence' but 'incompatibility'. The termination of his employment was confirmed in writing on 18 December and he was requested to leave the office with immediate effect, although he would be paid until 31 July 2009. The arbitrator found that the dismissal was procedurally unfair but substantively fair. Mbiza argued that this finding was unreasonable and thus reviewable.

The court, per Steenkamp J, noted that the arbitrator applied the correct test in cases of alleged incompatibility, namely that this relates to the employee's inability or failure to maintain cordial and harmonious relationships with his peers. For a dismissal based on incompatibility to be procedurally fair, the employer must, prior to dismissal, make some sensible, practical and genuine efforts to effect an improvement in the interpersonal relationships. As regards substantive fairness, it must be proven that there is an absence of cordial and harmonious working relationships. In this regard, the arbitrator held that there 'could have been uncomfortability' [sic] or personality differences. However, Steenkamp J pointed out that there was no evidentiary basis for this finding. This rendered the finding unreasonable and the finding of substantive fairness accordingly reviewed and set aside.
As regards the appropriate remedy, the court noted that the employee did not wish to be reinstated. With reference to ss 194 and 195 of the LRA, the court held that compensation is in addition to any amount to which the employee is entitled in terms of his employment contract. The fact, therefore, that Mbiza was paid for his entire contract term did not disentitle him to compensation in respect of the unfair dismissal. The court accordingly awarded Mbiza three months' compensation in respect of his unfair dismissal. In doing so, the court took into account that the employee's dignity and the freedom to engage in productive work was impaired by the unfair dismissal, as well as the fact that he was paid until 31 July 2009 although he stopped working in January 2009.

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Question:
I need some case law related to constructive dismissals and specifically to remedies where constructive dismissals took place and what the impact was, if any, on the trust relationship between employer and employee?
Answer:
Before addressing the question it would be prudent to give an overview on constructive dismissals. Constructive dismissal is a unique form of dismissal that was introduced in the 2002 amendments to the Labour Relations Act 66 of 1995 (LRA). In effect, an employee claiming a constructive dismissal terminates the employment relationship having the subjective belief that the employer has, in the absence of any rational or operational need, created an intolerable working environment.

The employee, in doing so and in terms of s 186(1)(*e*) of the LRA, can refer an alleged unfair dismissal dispute to the Centre for Conciliation, Mediation and Arbitration (CCMA). The matter would be conciliated and if not settled, set down for arbitration.

At arbitration the onus rests with the employee to establish that the employer created an intolerable working environment. Thus the employee's subjective beliefs must be tested against an objective standard, namely, would a reasonable employee under the same conditions conclude the working environment is indeed intolerable?

It does not necessarily follow that an employee who successfully discharges this onus would necessarily be entitled to any remedy. The onus would thereafter shift to the employer to provide reasons why such conditions were created. If the employer can establish that the conditions complained of emanate from an economic or any other operational requirement of the employer, then the employee's termination would not be seen as unfair.

It would be useful to read the judgment in *Member of the Executive Council for the Department of Health, Eastern Cape v Odendaal & Others* (2009) 30 ILJ 2093 (LC), (at para 60 – 63) where the court gave a general 'exposition' on the law regarding constructive dismissals and, in doing so, referred to a number of relevant and binding authorities on the subject.

Regarding the issue of remedy, s 193 of the LRA states that, should a dismissal be deemed unfair, an arbitrator may award the employee reinstatement, re-employment or compensation. It is trite that the remedy of reinstatement is the primary remedy available to an employee. (See *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others* 2009 (1) SA 390 (CC); (2008) 29 ILJ 2507 (CC) at para 36).

However, when dealing with constructive dismissals, it is generally accepted that reinstatement is not an appropriate remedy. Logically this makes sense; the issue of remedy arises only once the employee has successfully established that the employer made working conditions intolerable for no rational reason – why then would the arbitrator place the employee back into the very same conditions he or she resigned from? For this reason compensation is generally the appropriate remedy for an employee who is successful in his or her claim for constructive dismissal.

Then again like in all aspects of law there is often an exception to the exception. Recently in *Western Cape Education Department v General Public Service Sectoral Bargaining Council & Others* (2013) 34 ILJ 2960 (LC), the court held that it was not unreasonable for an employee to be reinstated under circumstances where the intolerable working conditions he had resigned from had changed and no longer existed if he were to be reinstated.

Question:

I have a client who applied for a position as a truck driver at the municipality. My client was appointed, and received a salary for a period of two months for this position. On the third month he was demoted to the position of a general worker, the position he was in before. Even his salary was reduced. Kindly advise on how to go about this matter.

Answer:

Your starting point is to ascertain which bargaining council your client falls under. Once you know this you should read that bargaining council's main collective agreement and determine what internal dispute resolution path must be followed, if any, before referring an unfair labour practice dispute to the bargaining council.

The reason for this is that employees falling under the public service sector are generally governed by a collective agreement that obliges them to follow stipulated procedures before referring their disputes to the bargaining council. Such procedures include, but are not limited to, following an internal grievance procedure and thereafter, should the dispute remain unresolved, referring the matter to the bargaining council. Referring a dispute to the bargaining council without having followed any agreed internal procedure could provide grounds for the employer to raise an *in limine* on the basis that the referral is premature. The applicable collective agreement will also set out the time lines for both lodging an internal grievance as well as for referring the matter to the council.

In terms of the Labour Relations Act 66 of 1995 (LRA) demotion disputes are regulated by s 186(2)(*a*). In the absence of an employee falling under the jurisdiction of a bargaining council, employees must refer their unfair labour practice disputes to the Centre for Conciliation, Mediation and Arbitration (CCMA) within 90 days from when the act or omission, which constitutes the alleged unfair labour practice, arose or within 90 days of when the employees became aware of the dispute – this as opposed to a 30-days time period for which to refer an unfair dismissal dispute.

In keeping with this comparison, an employee claiming an unfair labour practice bears the onus of establishing the conduct of the employer was unfair, which is contrary to an unfair dismissal dispute where the employer bears the onus to prove the fairness of a dismissal.

It is open for an employee to claim an unfair demotion if he or she is subject to a reduction in any one of the following remuneration, responsibilities or even status.

In *Matheyse v Acting Provincial Commissioner, Correctional Services & Others* (2001) 22 ILJ (LC), the court held:

'From a comparison of the duties, responsibilities and powers that ensue to the two posts, there can be little doubt that a transfer to Malmesbury as Head: Resource Management would result in substantially reduced or diminished authority, power, status and responsibilities for the applicant. This constitutes a demotion.'

The fact that your client's remuneration, responsibilities and status have been reduced, strongly suggests that your client has been demoted. Whether or not such demotion is

fair will depend on the circumstances that gave rise to the employer's conduct and how one presents argument on behalf of the employee before the arbitrator.

Do you have a labour law-related question that you would like answered?
Please send your question to derebus@derebus.org.za