Employment law update

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

Monique Jefferson *BA (Wits) LLB (Rhodes)* is an attorney at Bowman Gilfillan in Johannesburg.

Labour Court makes costs order against CEO in his personal capacity

In *Passenger Rail Authority of South Africa v Molepo* [2014] 5 BLLR 468 (LC), the respondent employee, who had been employed as the Chief Executive Officer (CEO) of the applicant's property division, was placed on special leave pending an investigation into his performance. During his period of special leave a meeting was held with him in which three options were discussed –

- converting his special leave into suspension pending the investigation;
- reaching a separation agreement; or
- appointing him as special adviser to the newly appointed CEO of the applicant's property division.

The respondent requested certain information about the special adviser position and was advised that he would be provided with a draft employment contract for consideration. The respondent continued to follow up on the status of the contract but was not provided with it. Eventually the respondent was instructed by the applicant's CEO to report for work in the position of adviser on real estate strategy. The respondent advised that he had never agreed to his redeployment into this role but had only agreed to consider the draft contract, which had not been provided to him.

The applicant's CEO responded and stated that this constituted a direct repudiation of their agreement. He communicated to the respondent that he had decided to terminate his employment on the basis that he had no interest in working for the applicant. The respondent alleged that he had been unfairly dismissed and referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). During the CCMA proceedings, the applicant alleged that there had been no dismissal but that the respondent had repudiated his contract, and that such repudiation had simply been accepted by the applicant. The respondent denied the repudiation of his contract. The commissioner found that the respondent had been dismissed and that such dismissal was substantively and procedurally unfair. The respondent was reinstated to the position of CEO.

The applicant took the commissioner's finding on review to the Labour Court. The Labour Court found that the applicant had conceded that the respondent had been dismissed and yet it had led no evidence to justify the dismissal at the arbitration. Furthermore, the respondent's denial that he had repudiated the contract had not been challenged by the applicant during the arbitration proceedings. The Labour Court found that there was no basis to challenge the commissioner's finding that the dismissal was

substantively and procedurally unfair and the review application was accordingly dismissed.

Mooki AJ furthermore expressed concern that the applicant had wasted public funds when litigating this matter. In this regard, the applicant had been ordered to pay wasted costs of the arbitration proceedings on a punitive scale, as well as the costs of a postponement of the review application because it had not adequately prepared for the matter. Furthermore, the applicant had changed its case on review and attempted to add another ground to the application. It had also given notice of its intention to appeal against an earlier order enforcing the award, but had done nothing further. This was found to amount to a delaying tactic which had the effect of halting the expeditious resolution of disputes which the Labour Court seeks to achieve.

Mooki AJ found that the abovementioned conduct should not be tolerated by the courts. He concluded that the applicant was a public entity and should not litigate 'willy-nilly' at the public's expense. He found that, in the circumstances, it was appropriate to order the applicant's CEO to pay the costs of the review application in his personal capacity. This was despite the fact that the applicant was a juristic person and the CEO was not cited as a party to the dispute. This said, the entire dispute had arisen from the CEO's actions, and Mooki AJ remarked that he may have held a different view if the CEO had not played any role in the dispute and the inappropriate manner in which it had been handled.

Time limits as per the practice manual of the Labour Court

In *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner and Others* [2014] 5 BLLR 516 (LC), the applicant sought an order staying the writ of execution that had been obtained by the respondent employee. The respondent argued that the applicant had no basis to stay the writ pending the outcome of the review as the applicant had been deemed to have abandoned the review by failing to file the record of proceedings within the prescribed time limit. This was on the basis that the practice manual of the Labour Court of South Africa provides that an applicant is deemed to have abandoned the review if it has not filed the record of the arbitration proceedings within the prescribed period, unless the applicant has obtained the respondent's consent to the delay. In this case, the record was filed ten days outside the time limit set out in the manual and the applicant had not obtained the respondent's consent to the delay.

The Labour Court considered the fact that practice directives have been held to constitute guidelines only. Molahlehi J, however, did not agree with this approach and found that, since the Judge President has been empowered to issue practice directives, these should be followed.
The time lines in the manual, therefore, should not simply be ignored. In this case, however, the applicant applied for condonation for the late filing of the record. Molahlehi J found that the power of a court to grant condonation where there has been non-compliance with the time limits set out in a practice directive should be inferred, even if the practice directive does not expressly provide for this. It was found that the applicant

had excellent prospects of being granted condonation for the late filing of the record and thus the application to have the writ of execution stayed pending the outcome of the review was granted.

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

Exceptional circumstances – consultation in terms of s 189 v compensation

Lebeya v Minister of Police and Another (unreported case no J728-14, 31-3-2014) (Lagrange J)

With 30 years of service, the applicant employee approached the court on an urgent basis seeking to interdict his employer, the South African Police Service (SAPS), from terminating his services until such time as the parties had engaged in consultation as envisaged in s 189 of the Labour Relations Act 66 of 1995 (LRA).

Intending to reduce the number of Deputy National Commissioners within the SAPS (a rank the employee occupied at the time), the second respondent (National Commissioner), advised the employee that he would be transferred to Head of South African Police Service Research Institute at the level of Lieutenant-General (a level the employee was currently at despite occupying the rank of Deputy National Commissioner).

This request was formalised in a letter addressed to the employee, dated 17 March 2014, wherein he was further advised that his failure to take up the post would render him ‘redundant’. In a written response the employee accepted the offer on condition that his rank of DeputyNational Commissioner remained the same and, therefore, his transfer would not be taken as either a promotion or demotion.

In reply the National Commissioner informed the employee that his refusal to accept the offer unconditionally rendered him redundant and that Human Resources would begin working out his exit package.

In a further letter to the employee’s colleagues, the National Commissioner announced that the employee, and other employees, had not accepted their respective new roles and would therefore be leaving at the end of March 2014.

On 24 March the employee’s attorney wrote to the National Commissioner inquiring from her the basis, in law, whereby it was a ‘natural consequence’ that the employee’s refusal to accept the new role, caused him to be redundant. In the absence of any reply from the National Commissioner or the SAPS, the employee sought recourse to the Labour Court.

Proceedings at court

Having satisfied itself that the matter was indeed urgent, the court, per Lagrange J, heard argument as to whether the employee has a right to have his termination suspended pending his employer holding consultations with him in terms of s 189.

The respondents' legal representative argued that under these circumstances it was not open for the employee to approach the court before being dismissed. If the employee wanted to challenge the fairness of his dismissal he could, after being dismissed, refer his dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), attend conciliation and if not settled, refer his dispute to either arbitration or to the Labour Court. Further to this, argued the respondents, the principle that the Labour Court should not hear an unfair dismissal claim under the guise of an interdict had been reiterated in a number of authorities.

In response, the applicant's legal representative argued that despite the decision to dismiss the applicant having already been taken, he remained employed until the end of March 2014. The right the employee therefore sought to enforce was the right to consult with his employer in circumstances where his intended dismissal was as a direct result of the employer's operational requirements.

The court began by noting that, while it had the authority to intervene in incomplete proceedings which may result in dismissal, it should do so only in exceptional circumstances. The question before the court was, therefore, whether the circumstances *in casu* could be considered to be exceptional.

It was clear to the court that if the applicant had challenged his dismissal after being formally dismissed and if it was found that his dismissal was procedurally unfair for lack of consultation, the employee would not be in the same position he would be in had he been given the opportunity to be a part of a joint consensus-seeking process prior to dismissal.

Proper consultation could see the retrenchment being avoided or the employee being offered a suitable alternative position. Under both instances the employee would not be left without a job. However, in the absence of consultation, any subsequent and consequential finding that the employee's dismissal was unfair for lack of proper consultation, the only remedy open for the court to award (as would be the case for any dismissal which is found to be procedurally unfair but substantively fair) is compensation.

Therefore, consultation brought with it certain advantages which would be lost should the employer dispense with such process and could not be restored by granting an employee compensation following a finding that the retrenchment was procedurally unfair. Unlike other forms of dismissal, where any procedural defect in a dismissal is largely restored by a *de novo* hearing before an arbitrator or judge, it would be meaningless – where an employee is dismissed as a result of the employer's operational requirements – to achieve proper consultation after the employee had been dismissed.

The court went on to say:
‘It is true, after his termination the applicant could complain that he was retrenched in a procedurally unfair manner. The procedural fairness of his retrenchment will, to some extent, be measured against the requirements of section 189, though that will not necessarily be determinative of the issue. If the applicant subsequently does proceed to challenge his retrenchment and succeeds only in establishing that it is procedurally unfair, he will not regain an opportunity to explore what alternatives that process might have yielded. He will be confined to payment of compensation as relief’ (para 17).

In finding the employee had a clear right to consultation prior to his dismissal and on the basis that he remained in the employ of the SAPS, the court granted the interdict and thus prevented the respondents from dismissing the employee until such time as the parties had engaged in proper consultations as envisaged in terms of s 189. The court further held the respondents jointly and severally liable for the costs of the application.