Employment law update

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Poor work performance of senior manager on probation

In *Palace Engineering (Pty) Ltd v Ngcobo and Others* [2014] 6 BLLR 557 (LAC), the Labour Appeal Court (LAC) considered the fairness of a dismissal of a senior manager for poor work performance. In this case, the employee was employed as the chief operations officer in terms of a three-year contract. The employee was subject to a six-month probation period and his employment contract stated that his appointment could be reviewed after two months if he failed to perform to the employer's required standards. He was also required to meet a performance target of R 100 million per year for sourcing new infrastructure work. Prior to the commencement of his employment, he was required to submit a business plan documenting how he endeavoured to achieve the performance target. He did not submit this plan and was informed that he should not report for duty. The employee challenged this decision by the employer and after some correspondence between the employer and the employee's attorneys it was agreed that the employee would commence employment and would be required to reach the performance target.

The employee's performance was carefully monitored and after three performance evaluations and the employee having failed to meet his monthly targets, an inquiry into his performance was convened. The chairperson of the inquiry recommended that a new target be set which was only a percentage of the initial target and that he be granted additional time to improve and reach the new target. The employer did not follow the chairperson's recommendation in its entirety but agreed to reduce the employee's performance target and to extend the period in order to enable him to meet this revised target. The employee continued to fail to meet the target and was accordingly dismissed.

The employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). At the CCMA the employee did not dispute the reasonableness of the target of R 100 million per annum and agreed that it was achievable. He, however, argued that he had been unable to source new business because he lacked the necessary tools of the trade and resources to generate business. However, under cross examination, he conceded that the lack of tools accounted only for 10% of his performance challenges. This said, the employee had drawn up a business plan after he had already become aware of the tools of the trade and resources at the company and personally set his target as R 1 million per month; and yet had failed to achieve this.

The arbitrator found that the employee's performance had been impacted on by the lack of tools of the trade and personnel. She also found that the employee's performance had been dependent on a number of external factors such as available contracts, capacity to apply for contracts and the significant time taken for tenders to be awarded. Thus, the dismissal was found to be substantively and procedurally unfair and compensation equal to six months' remuneration was ordered.

On review, the Labour Court considered the employer's argument that it was not required to provide the employee with the same degree of supervision, guidance and training that is required for lower skilled employees as the employee occupied a senior position. It also considered the fact that the employee was on probation at the time. In this regard, the court held that a fair process still needed to be followed with probationary employees, notwithstanding that employers have a degree of latitude when it comes to the reason for the dismissal on the basis of poor work performance. The Labour Court found that the dismissal was substantively unfair, but that the employer had followed a fair process with the employee. In the circumstances, the compensation awarded was reduced to three months' remuneration.

The employer took the matter on appeal to the LAC and argued that the employee's seniority and the fact that he did not even reach the targets he had set for himself were not properly considered. The employer further argued that when an employee is on probation, the reasons for the dismissal may be less compelling.

Molemela AJA of the LAC held that the evidence supported the arbitrator's finding that the employer's business was dependent on a number of factors and that the employee's performance was impacted on by a shortage of tools of the trade and support staff, as well as a shifting of the goal posts by the employer. The court held that the employee was not given proper support and his efforts were negatively impacted by poor administration. As regards the seniority of the employee, the court found that although senior employees are expected to know the standards that are expected of them and conform to those standards, this does not mean that an employer is relieved of the duty of providing proper resources to assist the employee in meeting the required standards. It was also pointed out that the employer failed to follow the recommendations of the chairperson of the inquiry. In this regard, the performance target was not reduced to the extent recommended by the chairperson and the employee was granted a shorter period in which to improve his performance.

The court pointed out that even when employees are on probation, the employer is required to offer guidance and discuss apparent shortcomings with them. Furthermore, the employee's employment contract set out twelve key performance areas and yet the employee was evaluated only on one performance area, that is the performance of a set target. It was also found that the employer did not seriously consider the employee's representations during the inquiry into his poor performance. The court found that although a probationary employee may be dismissed for 'less compelling reasons', this does not mean that the employer does not need a fair reason for the dismissal. The onus is still on the employer to prove that the dismissal was substantively fair and the

court concluded that the employer had failed to do so. The employee's dismissal was accordingly found to be substantively unfair and the appeal was dismissed.

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Chamber of Mines obo Members v AMCU and Others (unreported case no J99/14, 23-6-2014) (Van Niekerk J)

The Chamber of Mines, a registered employers' organisation, launched an urgent application seeking to interdict the members of the first respondent, the Association of Mineworkers and Construction Union (Amcu), from engaging in industrial action in pursuit of their wage demands. The matter came before Cele J who granted an interim interdict on 30 January 2014.

On the return date, before Van Niekerk J, Amcu brought a counter-application challenging the constitutional validity of s 23(1)(*d*) of the Labour Relations Act 66 of 1995 (LRA).

On 10 September 2013 the Chamber, acting on behalf of gold mining companies (Harmony, AngloGold Ashanti and Sibanye Gold in these proceedings) entered into a wage agreement with three trade unions, National Union of Mineworkers (NUM), Solidarity and UASA. It was specifically recorded that in terms of s 23(1)(*d*) of the LRA, the agreement would be extended to employees who were not members of the abovementioned unions. It was further recorded that each company had one workplace for purposes of s 23(1)(*d*).

Section 23(1)(*d*) reads:
'A collective agreement binds –
…
(*d*) employees who are not members of the registered trade union or trade unions party to the agreement if –
(i) the employees are identified in the agreement;
(ii) the agreement expressly binds the employees; and
(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.'

The contentious issue regarding the merits of the interdict application was the definition of 'workplace' as defined by s 213 of the LRA and which reads:
'... the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation'.

It was common cause that each employer had more than one mining site. It was also accepted that Amcu was the majority union in five mining sites, (three owned by AngloGold, one by Sibanye Gold and one by Harmony).

Relevant to this application was s 65(1)(*a*) of the LRA, which states that no person may engage in strike action if they are covered by a collective agreement (in this case the wage agreement) which prohibits strike action. The Chamber argued that Amcu was prevented from embarking on strike action in pursuit of higher wages in terms of s 65 read with s 23(1)(*d*).

Amcu argued that each mining site constituted a single workplace despite being owned by one employer, and as such, any strike action they embark on would not be hit by the provisions the Chamber sought to reply on.

In applying the definition of a workplace to the merits at hand, the court held that each employer operated one workplace despite having various mining sites. In support of this was the unchallenged evidence from the Chamber setting out reasons why each site is not independent of another and used common resources managed centrally at each entity's head office. On this basis the court confirmed the interim order.

Constitutional issue

In its counter-application Amcu, according to the court, sought to challenge s 23(1)(*d*) on the basis that it unduly prevented trade unions – whose members were covered by a collective agreement which neither they nor their union were a part of – from engaging in collective bargaining and embarking on strike action in support of a matter of mutual interest, both of which are constitutionally guaranteed rights set out in s 23 of the Constitution.

Amcu further argued that the section under review offended the principle of legality in that it gave private actors the power to bind unwilling parties in the absence of an independent authority to ensure that such power is exercised fairly and that decisions are not taken arbitrarily or capriciously. Furthermore any decision taken by the private actors was not subject to review by a court of law.

In narrowing Amcu's argument, the court held that the central determination it was called on to make was whether s 23(1)(*d*) unduly limits the right to strike.

The court began by saying that the mere fact that an organ of state is constrained by the doctrine of legality when exercising public power, does not mean that the conduct of private parties may not have consequences on third parties. Section 23 does not concern itself with the exercise of public power, but rather it enables the decision of private parties to have a legal consequence to third parties. This, in the court's view, did not in any way harm the rule of law.

In deciding whether s 23 unduly limited the right to strike, it became necessary for the court to have regard to s 36 of the Constitution. An application of s 36 required a court firstly to determine the purpose of a provision that limits a right in the Constitution (this can be determined by asking whether the law in question serves a legitimate government purpose) and secondly to consider the impact of the law on the affected right (the proportionality analysis).

With regard to the first part of the inquiry, the court held that s 23(1)(*d*) imbued the internationally accepted principle of majoritarianism, which is the specific model of collective bargaining the legislature adopted.

Against this background, Van Niekerk J, at para 71 held:

'The limitation arising from s 21(1)(*d*) read with s 65(1)(*a*) flows directly from its purpose. The very purpose of s 23 is to bind non-parties in the workplace in respect of collective agreements concluded by majority trade unions. Binding non-parties is not an inadvertent effect of s 21(1)(*d*) – on the contrary, that is its central purpose. Similarly, the purpose of s 65(1) is *inter alia* to prohibit strikes and lockouts over issues in respect of which a collective agreement prohibits industrial action. There are no less restrictive means of achieving the applicable purposes. If the parties were precluded from extending collective agreements in terms of s 23(1)(*d*), the specific purpose of the provision could not be achieved. What would remain is the ordinary common law principle that contracting parties are bound by their own agreements. As I have indicated, this would fundamentally undermine the broader purpose of the provision, which is to ensure functional, orderly and stable collective bargaining.'

The court went on further and found the application of s 23(1)(*d*) only limited Amcu's members' right to strike with regard to issues covered in the wage agreement and for the duration of the agreement. Therefore, the limitation of the right to strike was proportional and hence met the second part of the inquiry prescribed in s 36.
On this basis the court dismissed Amcu's counter-application with no order as to costs and confirmed the rule *nisi* with costs.

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