Employment law update

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Legal representation at the CCMA

In *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces (Incorporated as the Law Society of Transvaal)* [2013] 11 BLLR 1057 (SCA) the Supreme Court of Appeal (SCA) considered the constitutionality of r 25(1)(c) of the rules for the conduct of proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA) (the rule) that limits the right of appearance by legal practitioners in CCMA arbitrations concerning dismissals for misconduct or incapacity. In terms of this rule commissioners may exercise their discretion and permit legal representation at an arbitration on specified grounds.

The Law Society of the Northern Provinces (LSNP) applied to the High Court to have this rule declared unconstitutional as it was alleged that the rule unfairly discriminated against legal practitioners and that it was in contravention of the right to equality as guaranteed in s 9(3) of the Constitution and the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Furthermore, it was alleged that the rule contravenes ss 22 and 34 of the Constitution, which respectively guarantees the right of every person to choose his or her trade, occupation and profession freely and the right that every person has to have any dispute resolved in a fair public hearing before a court or another independent and impartial tribunal or forum.

This rule was declared unconstitutional and invalid by Tuchten J in the High Court (*Law Society of the Northern Provinces v Minister of Labour and Others* [2013] BLLR 105 (GNP)), but the declaration of invalidity was suspended for 36 months to enable the CCMA to promulgate a new rule that did not unfairly discriminate against legal practitioners.

In terms of the rule, legal practitioners are excluded entirely from CCMA conciliation proceedings. However, legal representation is permitted in all arbitration proceedings, except those concerning dismissals for misconduct or incapacity. This exclusion, however, is not absolute as legal representation is permitted where all parties and the commissioner agree or where the commissioner is satisfied that it would be unreasonable to expect a party to proceed without legal representation after considering factors such as the complexity of the matter and the comparative ability of the parties or their representatives to deal with the dispute.

Tuchten J based his High Court finding that the rule was unconstitutional on the principle of legality and the perceived inconsistency between the rule and the Promotion

of Administrative Justice Act 3 of 2000 (PAJA), which requires administrative action to be rational. Furthermore, s 3 of PAJA permits legal representation in serious cases and Tuchten J was of the view that dismissal cases are generally always serious in nature.

The CCMA had argued that it was necessary to exercise this discretion because the involvement of legal practitioners often leads to obfuscation, unnecessary complication of issues and time wasting. However, Tuchten J rejected the CCMA's evidence and found that it was impossible for a commissioner to decide in advance whether matters are complex or not. Tuchten J was of the view that, in the majority of cases, legal practitioners actually aided the efficient and speedy resolution of disputes. He concluded that the CCMA had not established that the limitation on the right to legal representation was reasonable and justifiable and the rule was therefore unconstitutional.

The decision of the High Court was taken on appeal to the SCA. The SCA held that Tuchten J had not considered the impact of the discretion afforded to commissioners by the rule. In this regard, a litigant is able to make a request for legal representation and the commissioner has considerable scope in exercising his or her discretion to determine whether legal representation should be permitted. Litigants are furthermore entitled to legal representation should the matter proceed to the Labour Court. Thus, it was held by the SCA that there was sufficient flexibility to allow for legal representation in deserving cases.

The SCA considered the historical background to the rule and the fact that the parties to the National Economic Development and Labour Council negotiations agreed that legal representation in arbitration proceedings concerning the fairness of dismissals for misconduct and incapacity should be permitted only when the circumstances justify it. This was because international research showed that South Africa's system of adjudication of unfair dismissals is one of the most lengthy and expensive in the world and legal practitioners were regarded as making the process more legalistic and expensive.

The SCA considered the fact that the CCMA plays an important role in resolving labour disputes and that it should resolve such matters quickly and fairly with the minimum of legal formalities. The SCA noted that the CCMA is not a court. Arbitration proceedings are administrative action and administrative tribunals are accordingly required to act consistently with PAJA. It was held that the right to fair and rational administrative action for litigants at the CCMA does not automatically entitle them to a right to legal representation. In terms of the common law there is a right to a procedurally fair hearing in civil and administrative matters, but neither the constitutional right to fair administrative action nor PAJA confers an absolute right to legal representation.

The CCMA led evidence that 80% of all matters referred to the CCMA relate to dismissals for misconduct. It was held that the reason why disputes over dismissals for misconduct and incapacity were carved out of the right to automatic legal representation is because they constitute the majority of disputes referred to the CCMA. The CCMA

argued that the reason for limiting legal representation is not the gravity of the consequences of the dismissal for the employee, but the fact that these dismissals usually involve one employee and not a whole workforce.

On appeal, the SCA found that the right to legal representation exists for the benefit and protection of litigants and the LSNP was not acting in the interests of litigants who use the CCMA, but rather was concerned with the fact that the rule denied its members work. The SCA found that the Constitution does not provide that lawyers have a right to receive business.

On the issue of the rationality of the rule, the SCA found that the fact that the rule distinguishes between different kinds of cases does not necessarily render the rule irrational. It was found that there was a rational historical basis for the rule excluding legal representation in disputes involving unfair dismissals for incapacity and misconduct since the majority of cases referred to the CCMA involve these categories of dismissals. There was accordingly a rational decision for the legislature to exclude legal representation from these categories of dismissals.

It was furthermore found that the rule did not infringe the legal practitioners' rights to dignity that is inextricably linked to the right to equality. It was further found by the SCA that the rule did not infringe the s 22 right to freely choose a profession and practise the chosen profession, since the rule does not regulate entry into the profession or affect the continuing choice of practitioners to remain in the profession. It merely impacts on a litigant's right to be represented in a particular forum. It was furthermore found that the rule did not contravene s 34 of the Constitution as there is no unqualified constitutional right to legal representation before administrative tribunals.

The SCA upheld the appeal with costs. The Constitutional Court subsequently dismissed the application for leave to appeal the SCA's decision with costs on the basis that the application bears no prospects of success.

• See also 2013 (Dec) *DR* 8.

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The court's inquiry on review

Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others (LAC) (unreported case no JA 2/2012, 4-11-2013) (Waglay JP)

The employee, Moreki, was employed by the appellant as a senior sampler whose duties included locating the exact position of a stope face from which samples would be extracted and tested to determine the suitability of mining at that specific location.

It was found that the location of a certain stope face, as provided by Moreki, was 11

metres off its actual position, which potentially could have cost the appellant R 1,2 million had it relied on the data Moreki provided.

He was charged and dismissed for 'serious neglect of duty' and failure to work according to an acceptable standard. Aggrieved by his dismissal, Moreki referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

At arbitration before the second respondent, Moreki was found guilty of poor work performance, but on the basis that his conduct could be corrected and improved, he was reinstated without back-pay.

On review the Labour Court, per Fourie AJ, dismissed an application to set aside the award for the following reasons –

• the fact that the arbitrator miscategorised the reason for dismissal as poor performance instead of misconduct was immaterial to the overall findings and not unreasonable;
• the finding that the dismissal was substantively unfair passed the test of reasonableness; and
• the grounds of review attacked the result of the arbitrator's findings.

With leave to appeal the appellant approached the LAC.

The appellant began by arguing that the court *a quo*'s third reason for dismissing its application was incorrect. On review, according to the appellant, it sought to challenge the process of how the commissioner arrived at his decision rather than the result of the commissioner's findings, which was what the Labour Court found. Following this point and in continuing its attack on the process of how the commissioner arrived at his findings, the appellant further argued that the Labour Court erred in that the correct categorisation of Moreki's dismissal was key when determining whether dismissal, as a sanction, was fair taking into account the totality of the circumstances.

In light of the recent developments concerning process-related grounds of review, the LAC began by examining the test the Labour Court adopts when reviewing statutory awards.

To start with, the LAC stated that the *Sidumo* test (*Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC)) does not postulate a simple evaluation of whether the arbitrator's findings were reasonable given the evidence that was presented at arbitration. The Constitutional Court in the *Sidumo* case held that the Labour Court must continue to hear review applications on the grounds listed in s 145 of the Labour Relations Act 66 of 1995, but, in doing so, the court must be alive to the fact that the constitutional standard of reasonableness is suffused in the application of s 145. This means that, on review, the court's inquiry does not end once it establishes the arbitrator committed a gross irregularity or misconceived the nature of the inquiry, but further inquires as to whether or not the arbitrator's findings nevertheless falls within the band of decisions a reasonable decision-maker could arrive at. Put differently, the court

must also inquire whether or not the arbitrator's misconduct renders the award unreasonable, taking into account the totality of the evidence that was before the arbitrator.

On this basis the LAC set out the following questions a reviewing court should determine when dealing with an argument that the arbitrator committed a gross irregularity:

• In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process employed by the arbitrator give the parties a full opportunity to have their say in respect of the dispute?
• Did the arbitrator identify the dispute he or she was required to arbitrate?
• Did the arbitrator understand the nature of the dispute he or she was required to arbitrate?
• Did he or she deal with the substantial merits of the dispute?
• Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?

While the LAC acknowledged that an arbitrator's failure to take into account material facts or to follow proper process could render an unreasonable outcome, these issues should not be examined in isolation and should be considered against a broad-based evaluation of the totality of evidence presented.

In applying this test to the facts before it, the LAC found that the arbitrator misconceived the nature of the inquiry – that being to ascertain the fairness of a dismissal for misconduct and not, as the arbitrator found, the fairness of a dismissal relating to poor work performance.

In highlighting the distinction between misconduct and poor work performance, Waglay JP held that the requirements for proving the fairness of a dismissal relating to misconduct and poor performance differ. In dismissals relating to misconduct the employer must establish that the employee, without proper justification, breached a workplace rule that he or she was, or reasonably should have been aware of. In dismissals relating to poor performance, the employer must generally establish a certain standard that, objectively speaking, is considered reasonable and which standard the employee did not meet despite the employer's efforts to assist the employee.

Returning to the merits of the case, the LAC noted that the evidence presented at arbitration centred around Moreki's failure to perform duties that he had correctly performed in the past, rather than him being unable to meet a standard that was required of him. The evidence led therefore related to Moreki's negligence, as opposed to his poor work performance.

Having arrived at this conclusion, the LAC, in line with the aforementioned inquiry, further considered the reasonableness of the decision by asking whether or not the decision was reasonable had the arbitrator correctly categorised the nature of the dispute. Taking into account the fact that Moreki committed an act of serious

misconduct whereby his years of service and seniority served as aggravating factors, together with the potential financial impact his conduct had on the appellant, the LAC found the decision reached by the arbitrator was not one that a reasonable decision-maker could have arrive at.
The appeal was upheld and the court *a quo*'s order replaced with a finding that the dismissal was substantively fair. No order as to costs was made.

Note: Unreported cases at date of publication may have subsequently been reported.

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