Employment law update

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The right to use sleeping facilities on work premises during a picket or lockout

In *Rooiport Developments (Pty) Ltd v Association of Mineworkers and Construction Union and Others* [2015] 6 BLLR 641 (LC), the Labour Court, per Lallie J, considered, *inter alia*, an application declaring that striking workers were not entitled to occupy sleeping quarters on the work premises for the duration of a strike and lockout.

The employer, Rooiport Developments, operates a diamond mine in the Northern Cape. After failed wage negotiations, the Association of Mineworkers and Construction Union (AMCU) issued the employer with a 48-hour strike notice, in response to which, the employer issued a lock out notice effective from the commencement of the strike. The main issue that the court had to decide was whether the striking workers had a right to occupy the sleeping facilities on the employer's premises.

The employer argued that the striking workers did not have the right to occupy the sleeping facilities, as employees are not entitled to use the sleeping facilities when they are not working. The employer relied on the fact that the workforce is divided into three teams that work different shifts. The employer contended that the employees are only allowed to occupy the sleeping facilities during their active duty cycle.

AMCU argued that the striking workers did have the right to use the sleeping facilities, as only half of the beds are occupied during a shift. AMCU relied on the contention that the employees had designated beds and left their personal belongings in the sleeping facilities even during their off days. Forcing the striking employees to vacate the sleeping facilities would force them to give up the protected strike as some lived as far as 280 kilometres from the employer's premises.

Looking at the totality of circumstances, the court found that the striking workers were only entitled to use the sleeping facilities when they were on active duty. This was evident from the fact that there are 350 employees and only 80 beds. It was clear from the circumstances that the striking workers lived at home on their off days.

The relevant picketing rules furthermore provided that accommodation during picketing would be determined by the terms and conditions of employment, which existed before the strike and picketing – no new rights were created. As AMCU did not succeed in proving that the striking workers had a right to use the sleeping facilities when not on active duty, there was no basis for the employer to be forced to create this right when they were on strike. There is accordingly no obligation on an employer to enhance striking employees' right to picket and to make their strike more effective. The court accordingly declared that the striking workers had no right to make use of the sleeping facilities on the employer's premises for the duration of the strike and lockout.

The importance of considering employees' personal circumstances when changing working hours

In *Jordex Agencies v Gugubele NO and Others* [2015] 6 BLLR 600 (LC), the Labour Court (LC) had to consider on review the fairness of a dismissal for misconduct where, following a change in operating hours, an employee was dismissed for leaving work early in order to catch the last bus home. The Commission for Conciliation, Mediation and Arbitration (CCMA) had found that the dismissal had been both procedurally and substantively unfair and had ordered that the employee be reinstated and paid an amount of R 2 750.

For a period of four years the emplo-yee, a cleaner, was allowed to leave work early in order to catch the last bus home. The employer then changed its working hours so that the end of the working day was a half an hour later than before.

The change in working hours was implemented in order to accommodate couriers, who often arrived at the end of the day. However, as a cleaner, the employee had nothing to do with the couriers. The commissioner was therefore not convinced that the employee had committed misconduct: She left early in accordance with her usual working hours for the purpose of catching the last bus home.

With regard to procedural fairness, the employee was told at the disciplinary enquiry that as her witnesses were family members and not from the employer's company, they could not testify. The commissioner found that the dismissal was procedurally unfair, as the chairperson's actions amounted to a refusal to allow the employee to call witnesses in her defence.

On review the LC, per Lallie J, held that an employer's power to regulate work practices is not without boundaries. The court pointed out that although an important factor in deciding the reasonableness of work practices is the effect on service delivery, here the working hours were changed in relation to a part of the business that did not effect the dismissed employee. The court held that the employer should have 'taken into account the [employee's] personal circumstances, her needs and circumstances, including family obligations and transport arrangements when changing hours of work'. The court pointed out that it was common cause that the employee had for four years left the workplace early in order to catch the last bus home, therefore, by changing working hours without consulting her, the employer forced her to breach the new work practice in order to get home. The LC found therefore, that the commissioner's decision that the dismissal had been substantively unfair, was not an unreasonable one.
With regard to procedural fairness, the LC held that the commissioner had erred in concluding that the employee was denied a chance to respond to the allegations against her. However, based on the substantive unfairness of the dismissal, the CCMA's award was not set aside and the application for review was dismissed.

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Time period for referral to arbitration

SAMWU obo KI Manentza v Ngwathe Local Municipality and Others (LAC) (unreported case no JA56/13, 24-6-2015) (Setiloane AJA with Waglay JP and Dlodlo AJA concurring).

Section 191(5) of the Labour Relations Act 66 of 1995 (LRA) reads:
'If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved –
(*a*) the council or the Commission must arbitrate the dispute at the request of the employee if … .'

When does an employee's '*dies*' (time period allowed) in which to refer their dispute to arbitration commence?

Does it automatically begin to run when either the certificate of none resolution is issued or when 30 days have lapsed since the dispute was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) or bargaining council – whichever event occurs first.

Alternatively does the word ‘or’ in the first line of the above section give an employee the option of deciding when his *dies* begins; either the employee can choose to refer his dispute to arbitration after 30 days from when he referred his dispute has expired (in which case the *dies* begins at the expiry of the 30 day period) or the employee can wait for the certificate to be issued, irrespective of whether this happens after the expiry of the 30 day period, (in which case the *dies* begins from date of certificate).

These questions formed the basis of the enquiry before the Labour Appeal Court.

Background

On 10 February 2003 the employee referred an unfair dismissal dispute to the bargaining council. Conciliation was set down for 3 April 2003 on which date parties agreed to extent the process for a further seven days. At the end of the extended period the employee requested the council to issue a certificate of non-resolution yet the council erroneously set the matter down for arbitration. A certificate was eventually issued on 15 April 2004.

On 24 June 2004 the employee referred his matter for arbitration. At arbitration proceedings the municipality raised certain points *in limine* the primary one for purposes of this judgment was that in the absence of conciliation being held within 30 days from when the dispute had been referred to the council, the employee had to have applied for arbitration within 90 days from the expiry of the 30 day period, yet he only did so months later. As such the employee was out of time when referring his dispute to arbitration, which meant the bargaining council did not have jurisdiction to hear the matter.

Having regard to the fact that the employee referred his dispute to arbitration within 90 days from when the certificate of non-resolution was issued, the arbitrator found the council did have jurisdiction.

On review the municipality’s argument found favour before Cele J who set aside the arbitrator’s ruling having found the employee’s referral was outside the prescribed time frame and, therefore, he needed to apply for condonation.

SAMWU on behalf of of the employee appealed against the judgment.

It was argued on behalf of the emplo-yee that the word ‘or’ in s 191(5) gave the employee two options in respect of when he could apply for arbitration; either when the 30 day period from when his dispute had been referred to conciliation had lapsed ‘or’ subsequent to affording both parties an opportunity to settle at conciliation, the employee could wait for the certificate of non-resolution to be -issued before deciding to refer his dispute to arbitration.

Therefore, the *dies* to refer his dispute to arbitration commenced in accordance with the employee’s choice.

In support of this interpretation it was argued that s 191(5) should be read with ss 135 and 136 of the LRA.

Section 135(5) places an obligation on the CCMA or bargaining council to issue a certificate once conciliation fails or at the end of 30 days from when the dispute had been referred or at the end of any further agreed period.

Section 136(1)(*a*) and (*b*) obliges the CCMA or council to arbitrate a dispute when a certificate has been issued and the referral to arbitration was made within 90 days from the date reflected on the certificate.

On a reading of these sections an employee is entitled to receive the certificate (as per s 135) and thereafter he has 90 days to refer his dispute to arbitration (as per s 136). Against these submissions it was argued that once the employee referred his dispute to arbitration on 24 June 2004, which was within 90 days of the certificate being issued, the council was competent to arbitrate the dispute.

The LAC held that the employee’s entitlement to refer his dispute to arbitration was not underpinned by any election made by the employee; his entitlement is realised at the occurrence of either of the two jurisdictional preconditions, whichever came first. Thus if an unfair dismissal dispute is conciliated within 30 days of it being referred to the CCMA, the employee’s right to refer their matter to arbitration accrues once the certificate is issued. The lapse of the 30 day time period post conciliation bears no effect on such a right. Likewise if 30 days lapse from when the employee referred his dispute to the CCMA and before the matter is conciliated, the employee accrues his right to refer his dispute to arbitration at the expiry of the 30 day period and any subsequent conciliation process has no bearing on this right or entitlement. For this reason the

time period in which to refer his matter to arbitration automatically commences once the right accrues. This interpretation, according to the LAC was consistent with the purpose and spirit of the LRA.

The court further drew distinction between ss 191 and 135 read with s 136. The former section deals specifically with disputes relating to unfair dismissals and unfair labour practices while the latter two sections deal with general disputes and matters of mutual interest.

In support of this, the court highlighted material differences between the sections. In s 191 there was no obligation on a commissioner to issue a certificate once conciliation failed or at the end of 30 day period as is the case in s 135. In addition, there is no requirement in s 191 that parties may agree to an extension of the conciliation process, as contemplated in s 135.

These differences reinforce the fact that an employee in an unfair dismissal dispute automatically acquires the right to refer his dispute to arbitration after the expiry of the 30 day period.

By implication the difference in the wording of s 191 as compared to s 135 read with s 136 meant that unfair dismissals and unfair labour practice disputes should not be included when reading s 135 and s 136, for in doing so would lead to material contradictions. Following this conclusion the LAC held that any support the employee placed on s 135 and s 136 to argue its case was misplaced.

The question then arose as to what time frame an employee claiming an unfair dismissal had to refer his dispute to arbitration. The relevance of this question stemmed from the court's finding that s 136, (which does stipulate a 90 day time period to refer a dispute to arbitration) did not encompass disputes contemplated in s 191 and whereas s 191(5) did not provide for any time frame in which to refer a dispute to arbitration.

The court held that there was no reason why the time period set out in s 191(11), which required an employee claiming an automatically unfair dismissal to refer their dispute to the Labour Court within 90 days from when conciliation fails or from when the 30 day period has lapsed; should not be read into s 191(5).

Thus the court held that an employee to a dismissal dispute had 90 days from when the certificate of non-resolution was issued or from when the 30 day period lapsed, whichever occurred first, to refer their dispute for arbitration.

The appeal was dismissed with no order as to costs.