Employment law update

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In *Algoa Bus Company (Pty) Ltd v Transport Action Retail and General Workers Union (Thor Targwu) and Another* [2015] 9 BLLR 952 (LC), the Labour Court (LC) ordered the respondent trade union and respondent-employees to pay the applicant an amount of R 1 406 285,33 as a result of economic loss suffered by applicant during an unprotected strike. The court ordered the union to pay the amount of R 5 280 per month, and the deduction of the amount of R 214,50 from the monthly salaries of each of the employees who embarked on the unprotected strike action, until the total amount was paid off.

The employees embarked on the strike on 23 January 2013 as a response to disciplinary action against certain co-workers who were subsequently dismissed. On 25 January 2013, the applicant obtained an interdict, but despite this, the strike continued until 30 January 2013. The available evidence showed that the union did little, if anything, to discourage its members from participating in the strike or to distance itself from the strike.

The LC, per Lagrange J, held that the disciplinary action that allegedly prompted the unprotected strike was legitimate and should have run its course without the pressure of industrial action. The strike was, therefore, not in response to unjustified conduct on the part of the applicant, neither did it serve any collective bargaining purpose.

The court noted that the union was in a precarious financial position. However, it held that 'the fact that an award for compensation against the union might cause it further financial damage is not in and of itself a reason for not granting relief'. What is, however, relevant, is whether the effect of the award of compensation is likely to seriously compromise its ability to function, bearing in mind that it may have members in other workplaces whose right to effective representation by a functioning union ought not to be seriously compromised by the unlawful conduct of a part of the membership or of a local organiser. This right does not, however, render the union immune from the financial consequences of reckless conduct by its members or office bearers. Considering the conduct of the workers, such as the failure to follow any pre-industrial action procedures, their persistence with the unprotected strike and failure to heed the interdict,

the court held that the financial burden of instalment payments was not unduly burdensome. These factors were weighed up against the damages suffered by the applicant, which included lost fares and subsidies for the duration of the strike, which the applicant would never be able to recover. Nevertheless, the court limited the amount of damages to only two-thirds of the losses that were sustained.

Insubordination

An employer imposes unilateral changes to terms and conditions of employment on its workers. The workers refuse to comply. Does that constitute gross insubordination? This is the question the LC had to consider in *Independent Commercial Hospitality and Allied Workers Union and Others v Commission for Conciliation, Mediation and Arbitration and Others* [2015] 9 BLLR 958 (LC). The nine individual applicants (the employees) worked for the third respondent, Suid-Kaap Stene CC in Mossel Bay. The employer experienced financial difficulties and wanted to introduce short time. The employer consulted with the union and the employees but no agreement was reached, and the employer then introduced the new roster unilaterally. In terms of the new roster, the employees would work four days a week instead of five. The union referred a dispute to the CCMA in terms of s 64(4) of the Labour Relations Act 66 of 1995 (LRA) requiring the employer to restore the employees' terms and conditions of employment. The employer did not comply. Instead, it instructed the employees to report for duty in terms of the new roster. They refused. The employer issued them with three written warnings over the period of a week for 'disrespect' and 'failure to follow a reasonable instruction'. Following a disciplinary inquiry, it then dismissed eight of the employees on 13 November 2012 and the ninth, a shopsteward, on 12 December 2012.

The applicants referred a dispute to the CCMA. The arbitrator held that the dismissals were fair. The arbitrator accepted that there were 'unresolved mutual interest matters' between the union and the employer, ostensibly referring to the s 64(4) dispute. She also noted that the union did not agree with the implementation of short time and the new operative changes in the roster. Yet she concluded that the managing member of the employer gave a 'valid instruction' to work in accordance with the new roster, that the employees refused to do so, and that such refusal constituted misconduct. She also noted that the employer had followed a progressive discipline and that the employer had consulted prior to the disciplinary process, but that the employees 'did not learn' from the consultations and the written warnings.

The union applied to the LC for the award to be reviewed and set aside. The court, per Steenkamp J, observed that it was common cause that the employees refused to obey an instruction. What it had to determine, was whether the instruction was reasonable. The court

held that it was not. Accordingly, the employees' refusal to comply did not amount to insubordination.

The court noted that where an employer unilaterally implements changes to terms and conditions of employment, employees have a number of options available to them –

- they may call on the employer to restore the *status quo* in terms of s 64(4), failing which they may strike;
- they may seek an interdict from the LC; or
- they may resist the change and tender their services on their existing conditions.

The employer's recourse in these circumstances is to lock the employees out until they agree; or, should the change be required for operational reasons, the employer could embark on a retrenchment consultation process in terms of s 189 of the LRA and offer short time as an alternative to potential retrenchment. If the employees then do not agree, they may be dismissed and such dismissal would be for a fair reason.

In this case, the employer did neither. The applicants did in fact refer a dispute to the CCMA in terms of s 64(4) and the employer refused to restore the *status quo* – it merely unreasonably instructed the employees to work in accordance with the amended working hours.

The court held accordingly that the arbitrator had mistakenly found that all that the employer was required to do was to consult on the proposed changes when in fact the agreement of the employees was required. She also deferred to the employer on the sanction of dismissal instead of applying her own sense of fairness. In doing so, the arbitrator committed a reviewable irregularity and the award was reviewed and set aside. The court held that the dismissal of the employees was unfair and ordered the payment of 12 months' remuneration as compensation to each of the employees.

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Fairness of the remedy v fairness of conduct

Director General: Department of Justice and Constitutional Development v GPSSBC and Others (LC) (unreported case no JR3306/11, 11-9-2015) (Fourie AJ).

The third respondent, Mr Mbonani applied for the position of Chief Director: Strategy Monitoring and Evaluation, a position he has been acting in for some years. Prior to interviewing the shortlisted candidates, the majority of the selection panel held the view that Mbonani was the most suitable person for the post.

In terms of the recruitment policy, the interviewing panel make recommendations to the executing authority, who in this case was the Director General (DG), who ultimately made the final decision whether to appoint the recommended person or not.

Before formally making the panel's recommendation, the chairperson of the panel deliberated their recommendation with the DG. In an informal discussion the DG informed the chairperson that her preference was to appoint the second recommended candidate, Ms Mpahlele as this would have a greater impact on employment equity within the department.

The chairperson consulted the other members of the panel advising them of the DG's preference, which ultimately saw the panel formally recommending Mpahlele to the post. The DG unsurprisingly confirmed the panel's recommendation.

Mbonani referred an unfair labour practice to the bargaining council and arbitration came before the second respondent who found the DG had committed an unfair labour practice and, as a result thereof, held that Mbonani should be permanently placed in the post he applied for, which was occupied by Mpahlele at the time.

Aggrieved by the award the Department of Justice and Constitutional Development brought an application to review and set aside the arbitrator's award.

The court began, firstly, to examine the Department's recruitment policy and found that the policy does not allow for the DG, the executing authority, to interfere or influence the interviewing panel as to whom to recommend. If this was allowed, held the court, then there would be no need for an interviewing panel and the executing authority could independently be allowed to conduct interviews and appoint a person to the post being advertised. For this reason the court held that the arbitrator's reasoning and findings that the DG committed an unfair labour practice could not be faulted.

The next issue before the court was whether the relief granted by the arbitrator was reviewable. In arriving at its decision to place Mbonani into the position he applied for, the arbitrator found that if the DG did not interfere with the process, the panel would have most likely recommended Mbonani be appointed and the DG would probably have confirmed this recommendation.

While the court did not take issue with the first proposition, it did do so with the second. The DG would have been within her rights not to confirm Mbonani's recommendation especially if she was of the view that Mpahlele's was suitable for the post and would have had a more positive impact on employment equity as compared to Mbonani.

In addition, the arbitrator failed to take into account certain material facts such as:

- The arbitration took place several months after Mpahlele was appointed to the post and the award was delivered more than a year after her appointment.

Mpahlele from such a senior post and replacing her with Mbonani would have severe disruptions to the functioning of the department.

- There was no indication that Mpahlele was not competent for the position.
- Even though Mbonani was a victim of unfair conduct, the unfairness was one of a procedural nature and not a substantive nature in that the DG would have been within her rights not to confirm his recommendation for reasons relating to employment equity.

The court held that in failing to consider the above factors the arbitrator failed to apply his mind to the relief granted and in doing so failed to strike a balance between the parties interests and the 'broader interests of fairness and equity'.

For these reasons the court set aside the relief granted by the arbitrator.

Both parties requested the court substitute the arbitrator's findings in respect of the relief granted as opposed to remitting the matter to the bargaining council. In doing so the court held:

'… there needs to be a careful assessment of the disruptive effect to an organisation that is necessarily caused by imposing a promotion and dislodging the successful incumbent from the position. The length of time that has passed between the promotion and the arbitration will always be an important factor in this regard, as the more entrenched the incumbent is, the more disruptive the relief of promotion will be.

…. interests of justice and fairness require that the incumbent (who by now will have occupied the position for almost five years) not be disturbed – the disruption to the department and to Ms Mpahlele would simply be too great and the wrong that was done to Mr Mbonani, was largely procedural in nature; in that it was not decisive of the ultimate outcome of the appointment.

Aside from the question of delay, a further factor that militates strongly against imposing a promotion on an employer is that an arbitrator or court is not well placed to determine which candidate is most suitable for an employer's operational needs – the employer is self-evidently in a far better position to do so. The remedy of ordering a promotion, while within an arbitrator's statutory powers, should in my view be exercised sparingly and with caution and only on the clearest facts.'

Following this reasoning, the court held that compensation as a remedy was more appropriate under these circumstances and awarded Mbonani six month's compensation calculated at the current remuneration scale of the post he applied for. The applicant was ordered to pay Mbonani's costs in the review application.