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LABOUR LAW UPDATE

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Labour Newsflash

Welcome to the next edition of the Labour Newsflash.

As always, labour law is never boring and the current labour system has a number of matters highlighting the scene and those that are playing in the background but no doubt will have an impact on your business once they are implemented.

Strikes have or are occurring across various sectors with various negotiations reaching a deadlock as Wage deals become more difficult to achieve due to, amongst other factors, the current economic conditions. Added to this, disciplinary enquiries are often more challenging due to technical points being raised by parties and the Court system being flooded with attempts to intervene in internal process. As illustrated by the attached case law, the Courts have taken a tough stand and will not intervene or take kindly to these shenanigans.

Playing in the background to the hostilities are three key matters which will impact your business or the economy in the near future:

1) **National Minimum Wage**: Business Day has reported that seven economists have been appointed to set the country's minimum wage. The panel, appointed by Deputy President Cyril Ramaphosa, held meetings with National Economic Development and Labour Council (Nedlac) constituents to receive input on a minimum wage floor. The panel is expected to announce a floor in two months. The report quotes Nedlac spokesperson Kim Jurgensen as saying the panel had met with constituents to establish positions and what informed them. More meetings were scheduled for coming weeks. The panel's job is not to do any new research, but to advise government on which of the research to accept.

2) Also under discussion is the **Employee Tax Incentive (ETI)**. The process is aimed at whether same will be maintained, the form that it will take, its application and mechanism

3) **Sugar Tax:** People have become very aware of their health and the implementation of a sugar tax has been hailed by certain people in these quarters. There is a negative side to this decision that is worth considering when weighing up the implementation of this new tax though. A recent study by The Beverage Association of SA – whose members include almost all manufacturers of non-alcoholic drinks in the country – has warned that up to 70 000 jobs in the industry could be lost if the Treasury's mooted tax on sugar-sweetened drinks was implemented in its current form. In a job scarce country, one job lost is one too many, and the suggested loss is worth debating – what are your thoughts?

CASE 1

No shortcut or intervention

In recent times the Labour Court has received numerous applications to interdict internal disciplinary processes.

The Court has taken a hard stance on this matter in ***Ngobeni v PRASA CRES and others*** *- (2016) 25 LC 6.2.1 also reported at [2016] 8 BLLR 799 (LC)* **.**

The Employee in this instance sought to halt disciplinary hearing with unproven allegation of bias against the presiding officer.

The allegation of bias was one of several preliminary points raised by the Employee. Once the chairperson had dismissed the points, the Employee launched an application for orders staying the hearing pending the final determination of a review application of the presiding officer's rulings on his points in limine, alternatively, ordering the presiding officer to recuse himself.

Having urgently been heard by the Court, it was noted that the LRA grants employees accused of misconduct the right to state their case before disciplinary action is taken and that these processes are different to those of a criminal nature. The Labour Court concluded that accusations of biasness should be dealt with in the same context. The Court held further that it will not interfere in incomplete disciplinary proceedings except in exceptional circumstances.

It found this was an attempt to frustrate the internal processes and that if there were issues of procedural fairness, there was an appropriate forum to deal with same and provide a remedy in terms of the LRA.

The Employee's application was dismissed with punitive costs order as between attorney and client.

Lessons to be learned:

The Court system cannot and should not be used as a means to frustrate processes. If found guilty thereof the Courts will be punitive in their handling of same.

The Labour Relations Act has provided the mechanisms and forums to resolve the issues and the Act should accordingly be followed.

CASE 2

Preliminary points at ConCourt

Having read our first case study of this newsflash we thought it pertinent to share the press statement and summary issued by the Constitutional Court where again processes were instituted which could be construed as an attempt to further delay process. As can be seen from the summary, the Constitutional Court takes a similar dim view to these type of matters as the Labour Court had done in the first case summary:

"On Wednesday, 24 August 2016, the Constitutional Court handed down its judgment in an application brought by two of its members, Justice BE Nkabinde and Justice CN Jafta, for the rescission of an order made by the Court on 16 May 2016.

After the coming into operation of the Judicial Service Commission Amendment Act, 2008 (amending the Judicial Service Commission Act, 1994) (JSC Act) the Judicial Service Commission (JSC) referred to the Chief Justice, as Chairperson of the Judicial Conduct Committee, a complaint that the applicants and other Justices of the Constitutional Court lodged with the JSC in 2008 against Judge President Hlophe for consideration. The complaint was that Judge President Hlophe had tried to unduly influence the applicants in regard to the outcome of certain cases relating to President Zuma in which the Constitutional Court was to hand down judgments. The Chief Justice established a Judicial Conduct Tribunal (Tribunal) to conduct an inquiry into the complaint. He appointed Judge Labuschagne, as President of the Tribunal, as well as two other members of the Tribunal. The applicants were required to testify in the Tribunal to substantiate the complaint.

In 2013 the applicants instituted a review application in the Johannesburg High Court to have that Court set aside the JSC's decision to refer the complaint to the Chief Justice and to have section 24 of the JSC Act declared unconstitutional. Section 24 gives power to the President of the Tribunal to appoint a prosecutor under the National Prosecuting Authority to lead evidence in the Tribunal. The review application was opposed by JSC. A Full Bench heard the application and dismissed it with costs. That Court also dismissed the applicants' application for leave to appeal. The applicants then applied to the Supreme Court of Appeal for leave to appeal. That Court dismissed their appeal on the merits but set aside the costs order against them.

The applicants lodged an application with the Constitutional Court for leave to appeal against the decision of the Supreme Court of Appeal. The JSC opposed that application. On 16 May 2016 the Court made an order dismissing the application on the basis that the Court did not have a quorum as a result of the Justices who were disqualified from sitting in the matter. This means that, in dismissing the application the Court was not making a pronouncement on the merits of the application. It was simply dismissing it because it could not constitutionally adjudicate it on the merits and could also not leave the application pending indefinitely. This basis for dismissing an application for leave to appeal where this Court does not have quorum was used to dismiss Judge President Hlophe's application for leave to appeal to this Court.

The applicants applied for the rescission of the order of 16 May 2016 on the basis that it was made erroneously and in their absence. There are two grounds upon which they relied in support of their application. The first is that this Court was obliged to have raised with them the issue of the disqualification of some of the Justices of this Court to enable them to make written submissions before this Court could dismiss their application. The second was that the Justices who were disqualified from sitting in the matter participated in making the order and this was an irregularity.

In its judgment the Court has held, firstly, that the Rule under which the applicants brought their application for rescission (Rule 42(1) (a) of the Uniform Rules of Court read with Rule 29 of the Rules of the Constitutional Court) is not applicable to decisions made by this Court in applications for leave to appeal at Conference without a public hearing. The Court reasoned that this is so because the requirement in that Rule that the order sought to be rescinded must have been made in the party's absence is meant for situations where a litigant otherwise has a right to be present in Court when the Court considers or adjudicates a matter in which he or she is a party. The Court pointed out that, since it considered the applicants' application at Conference, the Rule was not applicable. The procedure that the Court followed in dealing with the application is the same procedure that is normally used to deal with many other litigants' applications for leave to appeal. The Court said that this ground alone was sufficient to dismiss the applicants' application.

The Court held that in any event there was no merit in the applicant's contention that it should have raised the issue of the disqualification of some of the Justices with the applicants before deciding their application. The Court stated that Rule 19(3) of its Rules permits a party applying for leave to appeal to include in his or her affidavit any argument he or she wishes to place before the Court in regard to any issue. It also pointed out that Rule 19(6) authorises the Court to summarily deal with applications for leave to appeal without oral argument and without any written argument other than written argument included in the affidavits. This is the procedure the applicants' should have followed but they elected not to do so.

The Court also rejected the applicants' contention that the disqualified Justices were not entitled to participate in the decision to dismiss their application on 16 May 2016. The Court pointed out that the principle established in the Hlophe matter entitled those Justices to be party to the order dismissing the applicants' application.

In conclusion, the Court emphasised that it is in the interests of justices that the matter of the complaint against Judge President Hlophe be brought to finality without any further delay. The Court noted that the events that gave rise to that complaint occurred in 2008 and eight years later the matter has not been finalised."

Clearly we live in a fluid environment where the only guarantee is change. We look forward to keeping you appraised on the changes and representing your interests at various forums around the country.

Till next time, stay in touch and engaged with us.

Johnny and Grant
Global Business Solutions

26 August 2016