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Appeal – reinstatement by labour court – LRA s 189A process – notice of termination prior to 60 days lapsing – no agreement reached

Dispute existed – employer did not refer matter – appeal dismissed with costs

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Mangope v South African Football Association

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Failed to show lawful and reasonable order given to employee – no evidence as to insubordination – application dismissed

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SUMMARIES

De Beers Group Services (Pty) Ltd v National Union of Mineworkers

This was an appeal against a judgment of the court *a quo* in which judgment the appellant ('the employer') had been ordered to reinstate the members of the respondent ('the union').

During January 2009, four members of the respondent ('the employees') had been issued with notices in terms of s 189(3) of the Labour Relations Act 66 of 1995 ('LRA'). Less than 60 days after the issuing of the notices, the employees had been issued with termination notices.

In reaching its conclusion, the court *a quo* had held that no consensus on the retrenchment of the individual employees had ever been reached before the employees had been issued with termination notices. It was common cause that s 189A of the LRA was applicable to the disputed process, and that no facilitator had been appointed to assist in the process.

Section 189A(8) of the LRA stipulates that a dispute can be referred to the CCMA only after a period of 30 days has elapsed from the date on which the s 189(3) notice has been issued. The Labour Appeal Court ('LAC') referred to the matter of *Leonie Wiring Systems (East London) (Pty) Ltd v NUMSA and others* (2007) 28 ILJ 642 (LC), wherein it was held:

'As soon as an employer and the other consulting party/ies have reached consensus on all the issues underlying the employer's proposed retrenchment, or in the absence of a clear dispute between the parties, or if the employer reasonably believes there was no dispute between the parties, the employer may give notice of dismissal ... without further ado.'

As a result, the LAC held that the question in the present matter was whether a dispute had had existed between the parties which had necessitated that it be referred to the CCMA. The LAC held that in order to determine what constituted a *dispute* for purposes of s 189, read with s 189A, it was important to consider the purpose of the aforesaid two sections. A consultation process was designed to ensure that some form of consensus could be reached as to how to deal with the problem of a reduction in a workforce based on the employer's operational requirements. In the present matter, no consensus had been reached as to how to deal with the affected employees. At the time that the termination notices had been issued to the employees, no agreement had been reached on the dismissals of the employees, and accordingly, by implication, a dispute within the meaning of s 189 had remained to be resolved.

Since there had been a dispute, the employer had been in a position to refer the dispute to the CCMA after 30 days had elapsed from the date on which the s 189(3) notices had been issued. Only once a further period of 30 days had elapsed from the referral date of the dispute to the CCMA, would it have been competent for the employer to have given notice of termination. In a case in which s 189A(8) applied, the employer had to be clear that agreement had been reached and that a dispute had therefore not been under way at the time the termination notices had been issued. If the employer's position, on the evidence, had been unjustified, it ran the risk of having acted prematurely.

In conclusion, if the employer had failed to comply with the mandatory requirement of consultation in terms of s 189(2) of the LRA and had terminated an employee's employment

in breach of these provisions, then the dismissal had to be considered to have been invalid and accordingly of no force and effect.

In the result, the appeal was dismissed, with costs.

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Mangope v South African Football Association

In this application, brought in term of s 77(3) of the Basic Conditions of Employment Act 75 of 1997 ('BCEA') and the common law of contract, the applicant ('the employee') had accused the respondent ('the employer') of having breached the 3 years' fixed-term contract of employment the parties had previously entered into, and had accordingly claimed damages for the alleged breach.

It was not in dispute that the employee's fixed-term contract had been terminated prior to the expiry date of the contract owing to alleged performance issues. The employer submitted before court that the case could not have been resolved by way of motion proceedings since a dispute of facts had arisen, as was evident from both parties' papers.

The court confirmed the common law principle that any material breach of the terms of an employment contract could be regarded as a repudiation of the contract, entitling the innocent party either to elect to hold the other party to the contract and claim specific performance, or to claim damages caused by the breach.

The court referred to the matter of *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A), wherein the correct approach in dealing with a dispute of facts had been confirmed. In the *Plascon* matter, it had been held that where a dispute of facts existed, a final order could still be granted if the facts averred in the applicant's affidavit(s) which had been admitted by the respondent, together with the facts alleged by the respondent, justified such an order.

It had further been held that, in certain instances, the denial by the respondent of a fact alleged by the applicant might not be such as to raise a real, genuine or *bona fide* dispute of facts. It was therefore not every claim of a dispute of facts that resulted in the matter having to be referred to oral evidence.

The court also had to consider whether the dispute of facts had any bearing on the true legal issues to be resolved. The court held that in the present matter, the issue of a dispute of facts had arisen largely because the employer had misconceived the cause of action as being a claim based on unfair dismissal in terms of the Labour Relations Act 66 of 1995, whereas the employee's true cause of action had arisen in common law and contract.

The court held that the employer would probably have succeeded in raising the dispute of facts objection had the employee based his case on that of unfair dismissal. The dispute of facts was in any event, according to the court, not material to the issues at hand.

In assessing whether or not the employer had repudiated the employment contract, the court referred to clause 5 of the contract, which dealt with the employee's probationary period, in which clause it was stipulated that the employee would be given reasonable evaluation, training and counselling in the event of his performance being deemed unsatisfactory. There was no evidence before the court that the employer had ever advised the employee that his performance had been unsatisfactory, and which aspects thereof had not met with approval. According to the court, the undisputed evidence showed that the employer had failed to comply with the provisions of clause 5 of the contract.

As far as damages were concerned, the court held that the amount to be awarded to an employee as a result of an unlawful termination of a fixed term contract by the employer was the amount the employee would have received in salary, but for the repudiation of the contract by the employer. There was undisputed evidence before court that the employee, in compliance with the law, had mitigated his damages since the date his contract had been terminated, by obtaining alternative employment, albeit at a much lower salary.

In the result, the employee's claim was granted, with costs.

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Motor Industry Bargaining Council v CCMA & Others

This was an application to review and set aside an arbitration award issued by the second respondent ('the commissioner'), in terms of which award the commissioner had held that the dismissal of the third respondent ('the employee') had been substantively unfair.

The applicant ('the employer') had dismissed the employee on grounds of insubordination, alternatively creating hostility among his co-workers. These charges related to the fact that the employee had not been supportive of, and had had various issues with, a new computer system project embarked upon by the employer.

The court confirmed that the essential elements for insubordination were that (i) an order, which could also be in the form of a warning, had to have been given to the employee; (ii) the order had to be lawful; (iii) the reasonableness of the order had to be beyond reproach; and (iv) the refusal or failure by the employee to obey the order had to have been serious enough to warrant dismissal.

The court agreed with the commissioner that the evidence of the employer's witnesses at arbitration had failed to show that a lawful and reasonable instruction had been given to the employee, which he had failed to obey. Even when this issue had been specifically raised with the witnesses, they had been unable to indicate what instruction had been given to the employee.

The court held that all the employee had done was to raise his unhappiness and concerns around the new project. There was furthermore no evidence before the commissioner showing that the employee had stirred up hostility among his co-workers. The court held that if this had been the case, it would have expected the employer to call witnesses to testify about the alleged hostility created by the employee.

The court concluded that the decision arrived at by the commissioner was a decision that any reasonable decision maker, having regard to the evidence available, would have arrived at.

In the result, the review application was dismissed, with costs.

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