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EMPLOYMENT

Limiting employment claims: protection where it is needed

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South African labour laws are renowned as being progressive and protective of employees' rights, and labour dispute resolution procedures are intentionally designed to provide expeditious and cost effective dispute resolutions fora within which issues can be resolved without resorting to overly formal, costly or time consuming processes. However, what is not appreciated is that the structure of the rights and duties and processes, which are available to both parties, also takes into account fairness towards the employer. It would be incorrect to assume that South African labour laws are one-sidedly pro-employee, or that the employer has no expectation to also be treated fairly.

This is especially on the case of employees who are less likely, due to their skills, experience, length of professional service or qualification, to need the aid of the courts. This approach has been demonstrated and followed by the labour courts from as early as 2001 in the case of *Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinets CC & another (2001) 22 ILJ 120 (LC)*, in which the court found that the employer had tried to perpetrate a "cruel hoax" on a vulnerable worker, who performed cabinet making duties, by having him sign an independent contractor agreement, which stripped him of all of its employment rights. On the other hand, earlier in the case of *CMS Support Services v Briggs*, the Labour Appeal Court in 1997 had found that Briggs, who had elected to be a consultant for tax purposes, and had made an informed decision about her rights and duties as an employee or a consultant, had no right to claim employment protections.

In the recent case of *Kabe v Nedbank Ltd (2018) 39 ILJ 1760 (LC)*, the Labour Court also demonstrated that the scales are balanced, and that there are circumstances in which an employer is also entitled to fairness in the relationship, and in any disputes that may arise. In this case, Kabe was dismissed for poor work performance, but referred a dispute claiming that she had been not merely unfairly, but automatically unfairly dismissed. Kabe was herself a qualified lawyer, and had been advised by her legal team that such a referral was not competent in the circumstances. Kabe subsequently fired her legal team and amended her statement of claim to reflect an alleged automatically unfair dismissal. Since Kabe had alleged the reason for dismissal as automatically unfair, she had to raise a credible possibility that her dismissal fell within the scope of s 187(1)(h) or (d) of the Labour Relations Act, which provides for protection from dismissal in the case of an employee being dismissed for having taken action, or indicating an intention to take action, against the employer by exercising any right conferred by the LRA or participating in any proceedings in terms of the LRA (in this case that she referred a dispute of unfair labour practice) or due to her having made a protected disclosure. The court was satisfied that the employee had not produced any evidence supporting either of these claims. In addition, the court took into account that Nedbank had offered a generous settlement to her, which she had refused.

In light of the above facts, the Labour Court granted Nedbank absolution from the instance, which is an extreme form of dismissal of the dispute, which doesn't require the employer to defend the allegations further, and instead assesses that the employee has not formed even the basis of a possible claim. In addition, due to the Labour Court taking into account Kabe's position, it determined that her claim was frivolous, and awarded Nedbank its legal costs. The court also considered the interests of justice in general and realising that the courts should be reserved for persons with actual claims, determined that "allowing parties to bring frivolous cases does not only affect the opposing party, but also affects the administration of justice and the business of the court and judges".

The above case demonstrates that the labour courts and other dispute fora, including the CCMA, have to take fairness towards the employer into account, and that labour rights are not exclusively for the benefit employees. Employees of a sufficiently executive, senior or professional status should be aware of this judgement, and the approach of the court, and ensure that they receive and follow expert legal guidance in assessing and pursuing any potential legal claims they may have that flow from the employment relationship.



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