Employment law update

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Can a party be joined to proceedings after conciliation?

In *Kunyuza and Another v Ace Wholesalers (Pty) Ltd and Others* [2015] 7 BLLR 683 (LC), the Labour Court (LC) was required to consider whether a party that was not invited to conciliation could be subsequently joined to the proceedings. In the recent decision of the Constitutional Court (CC) in *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and Others* [2015] 3 BLLR 205 (CC) (see also 2015 (March) *DR* 39) it was held that joinder in the absence of conciliation against the party concerned was not permitted. Steenkamp J considered this case but found that the facts in *Kunyuza* were distinguishable from the facts in *Intervalve* and thus Steenkamp J reached a different conclusion to that of the CC.

What distinguished the *Kunyuza* case from the CC decision in the *Intervalve* matter, was that this case involved employees who were dismissed prior to a transfer of a business as a going concern in accordance with s 197 of the Labour Relations Act 66 of 1995 (LRA). The employees alleged that their dismissal was related to a transfer and thus was automatically unfair. The new employer, Temba Big Save CC, to whom the employees alleged that their employment should have transferred, was not a party to the initial proceedings. The employees, however, sought to join the new employer in the matter before the LC on the basis that it had a direct and substantial interest in the matter as their employment should have been transferred to Big Save in accordance with s 197.

Steenkamp J found that in the case of disputes arising from transfers of employment in accordance with s 197 of the LRA, the new employer may be subsequently joined as it has a substantial interest in the outcome of the dispute. This is particularly because should the employees seek reinstatement and be granted such relief, they would be reinstated to the new employer. To support this finding, Steenkamp J relied on the CC decision in *Western Cape Workers Association v Halgang Properties CC* 2004 (3) BCLR 237 (CC) in which it was held that the 'new employer' needed to be joined to the proceedings so that the new employer would be bound by a reinstatement order.

Steenkamp J was of the view that given the fact that the effect of s 197 is that the new employer steps into the shoes of the old employer, the new employer should be joined to the proceedings. This view is supported by the finding of the Labour Appeal Court in *Anglo Office Supplies (Pty) Ltd v Lotz* (2008) 29 ILJ 953 (LAC) in which it was held that employees who have instituted proceedings against an old employer must pursue those proceedings against the new employer instead of the old employer where there has been a transfer of a business as a going concern as the consequences of s 197 is that the new employer assumes liability for all actions done by the old employer and thus the employees have a right against the new employer.

Steenkamp J accordingly granted the joinder application.

Requirements for suspension

In *Tsietsi v City of Matlosana Local Municipality and Another* [2015] 7 BLLR 749 (LC), the municipal manager was placed on suspension pending the outcome of an investigation into serious allegations of financial misconduct against him. The employee alleged that the suspension was unfair and sought an order declaring the suspension to be invalid, unlawful and of no legal force and effect as he alleged that a fair process had not been followed in suspending him and the allegations of misconduct were vague.

In this case, the employee was invited to make written representations as to the reasons why he should not be placed on suspension. He was also provided with a list of some of the allegations against him, which were in the process of being investigated. The employee did not make written representations within the required time frame as he alleged that he required further particulars from the employer in order to do so. Furthermore, the employee alleged that the suspension was defective as it did not comply with the municipal regulations, which require that in order to place an employee on suspension the employer must have a reasonable belief that the employee may jeopardise the investigation. In this regard, the employee relied on two cases, in which it was held that municipal regulations require there to be a reasonable belief that the employee would jeopardise the investigation or be a threat to persons or property before such employee may be suspended. Rabkin-Naicker J held that the cases on which the employee relied should not be interpreted to mean that the allegations of misconduct are required to be set out in detail. This is because suspension is a precautionary measure and not punitive in nature. The purpose of suspension is to carry out an investigation and protect the employer from suffering further harm. Only after such investigation is conducted would the employer be in a position to provide the employee with sufficient particularity as to the charges against him or her. Furthermore, Rabkin-Naicker J held that the municipal regulations do not require the municipality to provide evidence that the employee may interfere with the investigation.

It was held that adhering to the employee's request for further particulars may actually jeopardise the investigation as the employee would be able to tamper with evidence and intimidate witnesses. Thus, the application to have the suspension declared unlawful was dismissed.

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Setting aside a settlement agreement

Cindi v Commission for Conciliation, Mediation and Arbitration and Others **(LC) (unreported case no JR2610/13, 4-8-2015) (Molahlehi J).**

Subject to s 145 of the Labour Relations Act 66 of 1995 (LRA), the Labour Court (LC) in terms of s 158(1)(*g*) has the power to review the performance of any function provided for in the LRA on any grounds that are permissible in law.

Relying on this section read with s 158(1)(*j*) of the LRA, the employee approached the LC to have a settlement agreement, concluded under the auspices of the Commission for Conciliation, Mediation and Arbitration, set aside on the basis that the conciliating commissioner unduly and improperly influenced her into settling her alleged unfair dismissal dispute.

The employee alleged that the commissioner 'inappropriately persuaded' her into signing the settlement agreement by advising her she had no prospects of success on the merits of her case. As a result of this advice the employee signed an agreement with her employer whereby it was agreed that the employee would receive R 1 825,20 from the 'Road Freight Agency Council'. This payment seemingly was in respect of the employee's outstanding leave pay held by the council.

On the strength of the decision in *Kasipersad v Commission for Conciliation, Mediation and Arbitration and Others* (2003) 24 ILJ 178 (LC) the employee argued that the commissioner committed a misconduct by advising her on the substantive merits of her case and in so doing, improperly influenced her into entering the settlement agreement. The commissioner's misrepresentation, according to the employee induced her into signing the aforementioned agreement which, on a proper understanding of the merits of her case, she would not have done but for the commissioner's undue intervention.

The third respondent employer argued that the settlement could not be set aside as it had not been made an arbitration award in terms of s 142 of the LRA and in addition the agreement was not a ruling made by the commissioner but rather an agreement reached by the parties and merely recorded by the commissioner.

While the court accepted that in the *Kasipersad* case the court set aside a conciliation process, as well as the ensuing settlement agreement on the grounds that the commissioner in that case exercised an improper influence in persuading the employee to withdraw his case, there had been other judgments which held that a settlement agreement, which was not made an arbitration award in terms of s 142, could not be set aside on review. On this point the court quoted, at para 15, with approval from the decision in *Malebo v Commission for Conciliation Mediation and Arbitration* (LC) (unreported case no JR1508/2009, 15-4-2010) (Lagrange AJ).

Molahlehi J also referred to other authorities wherein the LC set aside a conciliation process having found the commissioner committed a reviewable act in allowing a consultant into proceedings, but did not set aside the settlement agreement, which was reached by the parties themselves under circumstances where the conciliating commissioner did not unduly influence either party into settling the dispute.

With reference to the *Malebo* case and other similar judgments, the court held:

'I align myself with those decisions that say that a settlement agreement that has not been made an arbitration award in terms of s 142 of the LRA cannot be reviewed. In my view the correct analysis of cases similar to the present is to appreciate that the Commissioner in facilitating a settlement agreement has no decision-making powers. In this respect it may well be that during the facilitation process the Commissioner improperly influences one of the parties in arriving at a settlement agreement. In that case the settlement agreement would be invalid because it would have been improperly concluded. However, whatever the role and influence the Commissioner may have had in the conclusion of the agreement, the outcome remains the decision of the parties and not that of the Commissioner.

In my view, the third respondent is correct in its contention that the remedy in challenging the agreement that came into existence due to the alleged undue influence by the Commissioner, lies in the common law principles of contract. It is in this regard trite that the validity of an agreement in terms of the general principles of contract can be challenged under the following grounds:

• impossibility of performance.
• duress and/or undue influence.
• misrepresentation and/or fraud.'

The court also observed that in seeking to set aside an agreement, an applicant could not rely on the merits of his or her dispute which gave rise to the settlement agreement, as what the employee attempted to do *in casu*, but was limited rather to the aforestated considerations.

From the above quote it seems that under these circumstances the appropriate recourse open to a party who wants to set aside an agreement reached at conciliation, would be to pursue the same recourse one would embark on to set aside a contract on one or more of the common law grounds listed above.

The court dismissed the application to review and set aside the settlement agreement with no order as to costs.