Labour Relations Act cases on automatic terminations, retrenchment

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Two cases have found against employers in recent judgements - one on automatic terminations and the other on cost-to-company and overstaffing as a reason for retrenchment.

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Automatic termination clauses not enforceable

Due to public interest considerations, the Constitutional right to fair labour practices is entrenched in the framework of the Labour Relations Act. The court in Mwelase and Others v Enforce Security Group and Others dealt with whether it is permissible to contract out of the right not to be unfairly dismissed.

The employer was a private security service provider that entered into contracts with different clients and employed security officers on a temporary basis. A clause in the contracts of employment required each employee to agree that the termination of a contract between the employer and the client would automatically terminate the employee's employment contract and most importantly, such termination would not be construed as a retrenchment but as a completion of contract.

When the client terminated the contract with the employer, the employer enforced the above clause but this was challenged by employee's trade union that relied on s189 of the Act. It was the trade union's view that the employer was under an obligation to retrench the employees and the employees were entitled to severance pay.

The court found that the above clause has the effect of denying employees the right to challenge the fairness of the employer's conduct and enforce their rights in terms of s189, which, among other things, includes consultation and severance pay.

The court discussed the case of Mahlamu v CCMA & Others, where the court had to decide a similar question. The court held that the test is whether the subject of the right was intended to be the sole beneficiary. It found that the public interest rests with preventing exploitation and the waiver of their rights and in this regard, individuals cannot waive the right not to be unfairly dismissed.

Further, in South African Post Office v Mampeule, the court decided the validity of automatic termination clauses. It held that such provisions are impermissible in their truncation of the unfair dismissal protections afforded by the Act and are contrary to public policy.

The court relied on the above cases and held that, even though an employee might be deemed to have waived his or her rights conferred by the Act and the Constitution, such waiver is not enforceable, as the Act caters not only for individual interest but also for public interest. Accordingly, the court found the employees' dismissal to be both procedurally and substantively unfair and ordered compensation and severance pay.

Although the principle is clear that when abused, automatic termination clauses are unenforceable in our law, it must be borne in mind that the facts of this case are unique in that the employer was a temporary employment service provider and the employees were laypersons. What one notes from this case is that employers should consider Chapter 8 of the Act (Unfair Dismissal) when drafting employment contracts, especially termination clauses.

Using cost-to-company and overstaffing as retrenchment criteria

Section 189 of the Labour Relations Act regulates the retrenchment of employees, with the emphasis on the retrenchment procedure, as opposed to the substance of a proposed retrenchment of employees. The Act does not provide selection criteria for proposed retrenchments but requires parties to consult with a view of reaching agreement thereon.

As most retrenchments are for economic reasons, many employers prefer the cost-to-company selection criterion. Notwithstanding the above, the employer must show that the retrenchment is both substantively and procedurally fair.

In the Food And Allied Workers Union and Others v Cape Hospitality Services t/a Savoy Hotel, the court was faced with a question of unfair retrenchment on the basis that there was no consultation with the affected employees, nor with their trade union, and the selection criteria was not justifiable.

The employees sought reinstatement. The employer had retrenched them on the basis that it was necessary to cut costs in the business. It must be noted that at the time of retrenchment the employees earned less than R3000 per month. The employer alleged that it held a meeting with the employees but not with the trade union (FAWU) because the union did not have majority membership. At the meeting, the employer claimed to have explained the financial position of the company and the possibility of retrenchments. The employer adopted cost-to-company and being overstaffed as the selection criteria.

The court interrogated all the above issues and held that the notion that the retrenchment of two employees who earned less than R3000 per month was critical to the operational costs of the company was unconvincing.

The court also held that the understanding that an employer has a duty to consult with the union only if it has majority membership is incorrect in law. In line with the hierarchy of consultation provided in s189(1)(b)(ii) of the Act, in the absence of a collective agreement and a workplace forum, the employer is required to consult with the registered trade union whose members are likely to be affected by the proposed dismissals. The union in question, FAWU, had long since been recognised as a representative union and the employer was obliged to consult with it.

Turning to the selection criteria, the employer adopted cost-to-company and being overstaffed as the criteria. On the point of cost-to-company, the court looked at the fact that the employees were only earning R3000 per month. On the point of being overstaffed, the court looked at the fact that the employer was advertising for a chef in the same department where the employees were dismissed.

The court found the retrenchment to be both procedurally and substantively unfair, as there was no evidence to prove the meeting with the employees took place and because the selection criteria was not justifiable; the court ordered reinstatement with back-pay.

Although LIFO is the most commonly chosen selection criterion, the cost-to-company and being overstaffed criteria are acceptable but only if they are justifiable on the facts and such criteria must be a result of a joint-consensus seeking process between the employer and the consulting parties as contemplated by s189(2)(b) of the Act. The employer cannot adopt these criteria unilaterally, as this would result in procedural unfairness.

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