

Labour law forces employers on to a tightrope



The law does not protect employers from unfair acts of employees

Section 9(1) of the Bill of Rights contained in the Constitution of South Africa provides that “Everyone is equal before the law and has the right to equal protection and benefit of the law.” Section 9(2) provides that “Equality includes the full and equal enjoyment of all rights and freedoms. Section 23(1) of the Constitution provides that “Everyone has the right to fair labour practices.”

A basic question arising from the above is, ‘What does the Constitution mean by the word “Everyone”?’ does it refer only to human persons or does it refer also to juristic persons such as businesses and other employers? While the Constitution does not define the meaning of the word “Everyone” section 8(4) provides an answer to our question. It provides that “A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.” This, in my view, indicates that, as long as the nature of the right and of the juristic person make it possible for the juristic person to benefit from the right, the juristic person is entitled to it. This would mean that employers should have the right to fair labour practices by employees and should be able to sue employees at the CCMA for breaching such rights. However, the Supreme Court of Appeal appears to disagree.

In the case of *NEWU vs CCMA* (2007, Vol.16 No. 11 CLL page 111) both the CCMA and the Labour Court had found that the CCMA does not have jurisdiction to hear a case brought by an employer for unfair treatment by an employee. The Court said: “.... It is not thought that employers need any protection

against unfair resignations by employees. The majority of workers in this country are still ununionised and remain extremely vulnerable." The Court added that: "In my view the employer remains very economically strong compared to an individual worker and the fact that this protection is afforded the employee but no similar protection is afforded the employer does not come anywhere near to diminishing the power that the employer has." The Court concluded that legislation that would give the employer protection "... would be a step backwards in the field of labour relations and employment law in our country."

In my view the finding of the Court in this case is based on broad generalizations and ignores the provisions of the Constitution which clearly affords employers the right to fair labour practice. It is a very broad generalization to say that every employer is more powerful than its employees. Many employers are in a situation where they are struggling to survive. And indeed, many employers are forced by economic weakness to close down.

Be that as it may it is clear that the Courts are not prepared to uphold the employer's Constitutional right to fair labour practice. It is also clear that labour legislation is there to protect employees. Whether this is fair or not is academic. The fact is that, if employers cannot rely on the law for protection, they must protect themselves. This involves implementing systems, strategies and mechanisms for protecting the employer's interests. Employers are warned however, that these self protection mechanisms must themselves comply with the labour law in order to avoid infringing the myriad of employee rights contained in eight labour law acts, countless labour regulations and codes and a plethora of case law decisions.

How can employers walk the perilous labour law tightrope effectively? That is, how can employer's protect themselves in a way that conforms with the law on the one hand but allows for an effective workplace on the other hand? Such employer protections include:

Developing a thorough, comprehensive and in-depth understanding of all aspects of labour law

Ensuring that all managers and supervisors who hire, manage and fire employees have a clear understanding of what they may and may not do in carrying out their duties

Ensuring that all managers and supervisors are trained in the knowledge and skill required to manage employees in line with the law but, at the same time, in line with the principles of effective management

Developing human resources policies, procedures and rules that guide management in controlling employees both effectively and in compliance with the law

Ensuring that they have, within easy reach, reputable experts in employee relations and labour law who are able to guide employers in developing the above systems and to advise the employer in cases of employee misconduct, discipline, retrenchment, takeovers, mergers, trade union recognition, wage negotiations and CCMA disputes.

The above protection mechanisms, if they are properly implemented, can assist towards leveling the playing fields on which employers and employees operate. They can enable employers to operate profitably while treating employees fairly.

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