

SOME RELEVANT CASES THAT CAME THROUGH THE LABOUR COURT IN 2020

POPCRU OBO AGNES NKUNA v SSSBC
(2020) ZALCJHB 183 8 SEPTEMBER 2020
**INTERPRETATION AND APPLICATION OF COLLECTIVE AGREEMENT,
SECTION 24 OF THE LRA**

- Employee was charged in an internal disciplinary hearing.
- Found guilty and dismissed.
- Employee appealed the decision.
- In terms of SAPS regulations, an employer is required to complete the appeal within 30 days.
- Appeal finalised after more than five months and confirming the DC finding and dismissal.
- Matter referred to SSSBC in terms of section 24 of the LRA for interpretation.
- Basis for referral was that employee was not invited to supplement her appeal on receiving the record.

POPCRU OBO AGNES NKUNA CONTINUE

- Parties agreed to file heads of arguments without leading oral evidence, despite a clear dispute of fact.
- Arbitrator ruled in favour of the employer, holding that employee failed to prove that SAPS contravened the regulations.
- POPCRU took the matter on review.
- Labour Court reviewed and set aside the award and held that without a factual sub-stratum (underlying legal basis) the arbitrator committed a reviewable error.
- Court held that without hearing oral evidence on the factual dispute, arbitrator could not apply his mind properly to the issue before him.
- Matter remitted back to SSSBC for hearing *de novo*

POPCRU OBO AGNES NKUNA CONTINUE

- The decision reinforces a ruling in **Arends v SALGBC (PA6/13) [2014] ZALAC 69**
- It was held in Arends case that if parties decide to proceed on stated case, they must set out facts in which they agree and those in disputes and the law to be applied to those facts.
- **Lesson to be learned:**
- Without a stated case in which parties reach agreement on common cause facts and those in dispute, an arbitrator should be slow to agree with parties to dispense with oral evidence on issues in dispute.

PSA OBO WC GERNANDT V DEPARTMENT OF JUSTICE

(UNREPORTED) INTERPRETATION OF COLLECTIVE AGREEMENT, SECTION 24 OF THE LRA

- The dispute was also about interpretation of collective agreement.
- Parties agreed to dispense with oral evidence and opted to argue the matter on paper and written submissions.
- Arbitrator dismissed the applicant claim.
- Matter taken on review to the Labour Court on the basis that the arbitration proceedings was not an arbitration as contemplated in the LRA.
- Labour Court reviewed the award.
- Court held that without hearing oral evidence, and not agreeing on a proper stated case, the arbitrator was not empowered to issue an award without holding an arbitration proceedings.

PSA OBO WC GERNANDT CONTINUE

- Court further held that an award issued without holding an arbitration proceedings is null and void.
- Matter remitted back to GPSSBC for hearing *de novo*
- Again the case emphasizes that if parties wants to dispense with oral evidence they must agree on stated case, which records all the facts they agree on and those in dispute and, which they require the arbitrator to rule on.

DEPARTMENT OF RURAL DEVELOPMENT AND AGRARIAN REFORM EC **(PA3/18 [2020] ZALAC 24 UNFAIR LABOUR PRACTICE, SECTION 191** **READ WITH 186 (2) (a) OF THE LRA**

- Employee was interviewed for a vacant and funded post in which he acted for a number of years.
- Employer failed to finalise the appointment.
- Employee challenged the employer at the bargaining council for unfair labour practice.
- Arbitrator found that the employee was the only candidate legible for appointment.
- In the absence of cogent reasons on the part of the employer why it did not proceed with the appointment, the arbitrator ruled that the employer committed unfair labour practice and the arbitrator appointed the employee into the post.

DEPARTMENT OF RURAL DEVELOPMENT AND AGRARIAN REFORM EC CONTINUE

- Employer took the matter on review to the Labour Court.
- Employer argued that it had the prerogative to decide on whom to promote and the arbitrator should have deference to it.
- Court acknowledged the trite rule that an employer has prerogative to decide on whom to promote and when to do so.
- The prerogative can only be interfered with if it is evident that the employer's decision was unreasonable, considered irrelevant issues, was arbitrary or manifestly unfair.
- Labour Court upheld the arbitrator's decision.
- Court held that the department failure to fill the post, which was critical and funded, without good reason, when there was a perfectly suitable candidate with experience and a record of exemplary conduct was capricious and unfair.

DEPARTMENT OF RURAL DEVELOPMENT AND AGRARIAN REFORM EC CONTINUE

- **Lesson to be learned:**

- Employers in the public service cannot hide behind employer's prerogative when it is clear that the decision not to promote is founded on unreasonable, capricious and other arbitrary grounds.
- Where there is evidence that the prerogative has been exercised unreasonably, and taking into account all relevant factors, the arbitrator will have reason to interfere with the prerogative in the interests of equity and fairness.

LYTTELYTON DOLOMITE v CCMA (JR 288/18 [2020] ZALCJHB 132 UNFAIR DISMISSAL, SECTION 191 READ WITH 188 (1)(a) OF THE LRA

- An employee, a union shop steward and a branch chairperson was dismissed after being charged with misconduct for sharing misleading information relating to payment of incentive bonus.
- Challenged the dismissal at CCMA.
- At arbitration the inexperienced employer representative led an entirely hearsay evidence.
- Commissioner did nothing to alert the employer representative of the hearsay evidence.
- Commissioner found dismissal procedurally fair but substantively unfair and reinstated the employee.
- Commissioner found that the evidence produced by the employer was essentially hearsay and inadmissible

LYTTELYTON DOLOMITE v CCMA

CONTINUE

- Employer took the matter on review to the Labour Court.
- The ground of review was that the commissioner's failure to warn the employer representative of the hearsay evidence, and thereafter drawing negative inference was an irregularity which vitiated the award.
- Argued in favour of the commissioner that had she advised the employer rep to call another witness to corroborate the hearsay evidence, it would have amounted to unduly assisting a party to the detriment of another.
- Argued further that the commissioner had a duty to guard against such instances and against being biased.
- Labour Court held that the commissioner was aware, based on the record that she was faced with an inexperienced representative and coupled with hearsay evidence.

LYTTELYTON DOLOMITE v CCMA CONTINUE

- Court held further that the commissioner had a duty in terms of the CCMA guideline, to lend a helping hand but failed to do so.
- The commissioner should have informed the employer representative what weight she would give to hearsay evidence and the negative inference to be drawn from failure to call another corroborating evidence.
- Court held that the commissioner had a duty firstly to explain the significance of **Section 3 of the Law of Evidence Amendment Act of 1988**.
- Secondly she had to rule timeously on the admissibility of the hearsay evidence.
- Court further held that, the fact that the decision on hearsay evidence occurred at the end of arbitration prevented a full ventilation of the dispute.

LYTTELYTO CN DOLOMITE v CCMA CONTINUE

- The Labour Court reviewed the award.
- Court held that a reasonable commissioner in the position of the arbitrator would not only have known what the law on the admission of hearsay was, but would have been alert to the introduction of hearsay evidence and would have addressed its admissibility promptly to ensure fairness and expediency.
- The matter was remitted back to the CCMA for hearing *de novo*.
- **Lesson to be learned:**
 - If faced with an inexperienced representative an arbitrator has duty to offer a helping hand, as long as he or she does not descend into the arena and start to conduct the case for the party.
 - Where a representative of a party adduce hearsay evidence the arbitrator needs to alert the party that he or she is leading hearsay evidence.
 - Allow the representative to address the arbitrator on why hearsay evidence should be admitted
 - Make timeous ruling on the admissibility of hearsay evidence taking into account the Law of Evidence Amendment Act.