South African employment litigation

January 2018

Some practical thoughts and observations

Employment disputes quickly become expensive, are long-drawn and have the ability to cause reputational risk to both disputing parties. More often than not, even settlement agreements intended to resolve the dispute – which are not properly formulated – end up being contested in court. There are myriad forms of labour disputes that can play out in the workplace.

The rate of labour litigation in South Africa is particularly high and there are a number of reasons for this phenomenon. As a starting point, Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court of law or an independent and impartial tribunal.

The CCMA and Labour Courts were established to resolve labour disputes. CCMA arbitrations provide independent and impartial tribunals. The employment tribunal is obliged to ensure that the proceedings before it are always fair and section 23 of the Constitution guarantees that everyone has the right to fair labour practices.

As a first step in its statutory mandate, the CCMA must attempt to have the parties reach settlement at the stage of conciliation. The intent is to resolve the dispute at the point of conciliation. This is a historical element of labour litigation that was carried into the current dispensation. It is in my experience a useful first step. To what extent what is said in conciliation is entirely off the record is pending before the Constitutional Court for determination. We eagerly await judgment sometime during the first half of 2018.

Whether a matter is, however, to be settled or not is in reality dependant on the particular facts of the matter. A number of claims end up becoming matters of principle for employers who will understandably not create bad precedent by settling with an employee dismissed for misconduct or poor performance no matter the cost or inconvenience.

Where matters are not resolved, arbitration is the next step. The procedures provided for in the Labour Relations Act make plain that disputes are to be speedily and cheaply resolved by the CCMA. No appeal lies from the CCMA, but the Labour Relations Act expressly requires that the Labour Courts are to scrutinise the decisions of the CCMA. Its aim is to provide affordable, accessible and quick resolution of workplace disputes.

Employees are obviously entitled to assert their rights. If by doing so, the Constitutional Court has observed, this results in a greater volume of work being generated for the CCMA, then the state is obliged to provide the resources to ensure that constitutional and labour law rights are protected and vindicated.

The reality is that there is certainly a greater volume of claims being pursued through the CCMA. In December 2017, in testament to this proposition, the CCMA for instance through its Research Unit: Legal Services announced that it was conducting an investigation "to uncover reasons for (the) increasing caseload - towards the deployment of strategies to reduce the caseload of the CCMA".

On the outer-end of an arbitration, awards have also over the years developed to become a lot more easily enforceable especially in the hands of a successful employee. In the 2016 Labour Appeal Court decision of *CCMA v MBS Transport CC and Others, CCMA v Bheka Management Services (Pty) Ltd and Others* it was held that the 2014 amendments to section 143 of the Labour Relations Act, provided that once an award is certified, it is enforceable as if it were an order of the Labour Court in respect of which a writ had been issued. In other words, the LAC interpreted section 143 as not justifying the (old) practice that the Registrar of the Labour Court should issue a writ of execution. Thus, where an employee has a monetary award, which is certified by the CCMA Director, the award is executable as if it were an order of the Magistrates' Court. The reason is to expedite the execution of awards after the amendments of 2014.

Labour litigation in South Africa is serious and is especially not well understood by employers, let alone foreign entities that conduct business in the country.

Unlike the Magistrates' Court, which has a maximum monetary jurisdiction in the ZAR300 000 region, the CCMA does not have a similar limitation to its monetary jurisdiction. Thus, claims in excess of ZAR1 million come before the CCMA routinely, in our experience.

SARS, towards the end of 2017, published its annual tax statistics showing the breakdown of South African taxpayers. According to SARS' data, there are 148 266 taxpayers who earn in the ZAR1 million to ZAR2 million per annum salary range. The largest tax pool is drawn from those earning between ZAR250 000 and ZAR350 000 a year (825 000 people). The vast majority of taxpayers – over three million people – earn under ZAR350 000.

Realistically, the CCMA must have been set up for those persons who earn up to the ZAR350 000 mark. This accords closely with the monetary jurisdiction of the Magistrates' Court as well. Claims in excess of such amounts should not come before the CCMA for arbitration, in my view. The current system was not designed to deal with disputes where at the least the financial liability runs into hundreds of thousands of rand and often far beyond.

The largest recent monetary claim that we were retained to defend in the CCMA following a dismissal was in the region of ZAR22 million, being the sum of options (that is, disputed benefits) and remuneration. No doubt there have been other claims around town in excess of such

quantum, which may have come before the CCMA. To reiterate the earlier point - a claim of such magnitude could have been enforced quickly, as if an order of the Magistrates' Court, had the employee succeeded. The risks are immense for both parties.

In previous publications following the judgment of the Constitutional Court in *Sidumo* we have stressed that arbitration is the only "real bite at the cherry" in the entire continuum of the labour litigation sequence. So, it's best to be prepared for that process. This is especially so, as there is also no automatic right of legal representation in disputes related to capacity or misconduct. The basis for review is intended to be restricted.

Large financial claims against employers and awards of reinstatement also probably constitute the main motivator for reviews to the Labour Court.

To this point we have only emphasised financial liability. The real practical risk off course in the CCMA is an award for reinstatement with full back pay. This is the primary remedy under the law and a potent weapon in the arsenal of a dismissed employee. This multiplies risk associated with CCMA litigation exponentially.

The time has probably now come for a serious re-consideration of the overreaching jurisdiction of the CCMA. The Labour Relations Act is not perfect. Claims in excess of ZAR350 000 and/or where an employee seeks reinstatement (and such election for reinstatement should only be made after a failed conciliation), should not be arbitrated upon by the CCMA. The CCMA should only conciliate such matters. Such claims should fall within the jurisdiction of the Labour Court. My guess is that there would also be a significant decrease in the workload of the CCMA and it would also help better focus its conciliation mandate. I am yet to find cogent argument against this line of thought. Unions are not likely to put up major opposition to such proposal as such changes would not impact their members.

Where parties believe that settlement is the better option, it is important that the employer be properly advised in the negotiation and conclusion of the settlement agreement. All too often we come across agreements concluded that are "not fit for purpose" (read: incorrect precedents being utilised), which then gives rise to further disputes, or where the parties fail to fully understand the principles of the law of contract in the negotiation process. There is a tendency for boiler-plate clauses and template agreements to be used by multinationals. The applicability of such clauses to local jurisdiction needs to be considered. In South Africa over the last number of years we have moved towards plain English drafting and to avoid legalese as best as possible. This we maintain is the starting point in the drafting process.

The litigation terrain is rough and anyone who steps into the arena must accept the field for what it properly is: a theatre of war or, as aptly once said to me "institutionalised violence".

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