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LABOUR LAW NEWSFLASH - EDITION 2/2017

Welcome to the next edition of the labour newsflash.

At the time of writing, South Africa was still coming to grips with the implications of the State of the Nation Address and we were waiting to see how this then impacted on the Minister of Finance's Budget Speech.

The talk on the State of our Country and the Economy has left one doing an internal analysis on what the state of the labour market system is.

Unemployment is high, inequality still prevalent and the parties on either side of negotiating tables still seem to have a chasm between them.

With a number of stakeholders waiting with a bated breath for the Assign Services outcome as well as a flurry of equal treatment cases, one wonders how all of this will impact on job creation in our country. Added to this, the impact of the recently announced National Minimum Wage will also be monitored closely.

In a job-scarce economy, it often appears that we lose our compass and get stuck in a desert of unemployment with the quicksand of litigation, strikes and economic circumstances often impacting on our ability to find our way to what should be the final goal: job creation.

In the midst of this climate, Global has once again brought together some of the best and brightest minds in the field of Labour Law to our [Annual Employment Conference](#) to be held at Emperors Palace on 20 April 2017.

You will have the opportunity to listen to and engage with speakers and panellists such as Justice Malala, Irvin Jim, Prof Haroon Borat, Tabea Kabinde, Thembi Chagonda, Darren Graham, Cameron Morajane, Craig Kirchmann, Adv Anton Myburgh SC and Johnny Goldberg.

We look forward to seeing you there and in the interim, please feel free to send us any questions you may want the panellists to deal with at this event.

As always, enjoy the reading of the enclosed two case summaries.

Till next time

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Case Summary 1: Workplace definition and extension of Collective Agreements

Our Constitutional Court dealt with these principles in *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* [2017] ZACC 3

The outcome is very thorough and extensively unpacks the arguments and underlying legal principles. This summary sets out the outcome of the matter briefly for ease of reading.

At issue was whether workers at five gold mines may exercise the right to strike while an agreement prohibiting strikes, to which they were not party, is in force. Because Association of Mineworkers and Construction Union (AMCU) was not a party to the agreement, it did not regard itself as bound.

A Collective Agreement between the Chamber of Mines and other majority trade unions in the gold mining sector was found to be binding on members of the AMCU, even though AMCU had majority representation at certain individual mines.

After an unpacking the legal principles around the extension of collective agreements, the Court found that AMCU's challenges to the constitutional scheme that permits extensions of collective agreements to non-parties under section 23(1) (d) cannot succeed.

Besides the issue of the extension of the Collective Agreement, the Court also had to decide on the issue of the definition of "workplace".

Both the Labour Court and the Labour Appeal Court determined that each mining house operated fundamentally as a single workplace, and that each AMCU-majority mine was not an independent operation.

The Court found that even upholding AMCU's argument that the application of the statutory definition is not a purely factual enquiry does not lead to a different finding. No reason in constitutional principle, legal analysis or factual assessment provided a reason for the Constitutional Court to overturn those findings.

The Appeal was dismissed with no order as to costs.

Lessons to be learned:

Core principles of labour law have been enforced with this outcome. The Court has provided clarity on the definition of workplace and has reinforced the age-old principle of Majoritarianism.

Case Summary 2: Temporary Employment Service Reinstatement

In the matter of **Jacobs / Labour Flow Ltd and another** (2017) 26 MEIBC 8.17.1, a packer on assignment was dismissed for going absent without leave. The employee claimed that he had been granted a day's leave of absence to attend to an emergency but that he had requested permission via WhatsApp to extend his leave, and that his dismissal was unfair.

The Commissioner noted that the employee had been charged with and dismissed for being absent without leave for three or more working days without permission and without good cause.

The Commissioner found that the dismissal was substantively unfair as there was good reason for the employee's absence and that this was the employee's first disciplinary offence, and progressive discipline should have been applied if the employer was not satisfied with the employee's explanation.

The interesting aspect of this case is the relief given by the Commissioner. The Commissioner noted that the employee had worked for the TES's client on a fixed-term contract for longer than three months. No evidence had been led to indicate that the employee's services were of a temporary nature. Since the employee had by then been deemed employed by the TES's client, section 198A applied.

The employee was accordingly reinstated to the position he held with the respondent's client, who was "deemed" his employer.

Comment:

It is interesting to note that this particular aspect was never before the Commissioner and therefore it may be argued that she cannot rule on it. One has to wait and see whether the matter is taken on review.