SEENA | LABOUR

CORPORATE NEWSLETTER

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IN THIS EDITION

VOORWOORD

Winter is uiteindlik hier en ons by SEENA beplan ons gebruiklike middel van die jaar oorsig. Ek dink dit is belangrik om gedurende Julie te reflekteer wat in ons besighede gebeur het en ons beplanning aan te pas vir die maande wat volg.

I am cautiously optimistic that the second half of 2017 will be better for business in Namibia.

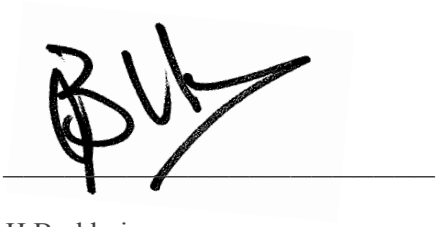
In this issue of our Newsletter there is an interesting article on a recent Labour Court judgement compiled by our National Manager, Nicky Smit.

Ons gee ook kennis van ons premieverhogings en het dit goedgedink om dit tot onder inflasie te hou teen 6%, effektief vanaf 1 September 2017.

Seena training gee 'n oorsig van ons "Junior Bestuurskursus" en u kan ook meer hieroor lees.

Your business is important to us and I believe so is the assistance you get from Seena an important part of your business' success.

If you have any questions or comments feel free to contact us, we are always a phone call away.



JJ Barkhuizen
MANAGING DIRECTOR

CONDUCTING OF DISCIPLINARY HEARINGS IN THE ABSENCE OF EMPLOYEES & INCIDENTAL ISSUES

The recently reported judgement of Judge Ueitele, in the matter of Josef v Stone Africa (PTY) Ltd. & Others (LCA 56/2015) NHCMD 20, is of noteworthy importance to Namibian employers for a number of reasons. To get a grasp of the legal issues at play, a brief summary of the merits of the matter is needed.

Mr. Josef was employed by Stone Africa as a Load Operator on the 1st of March 2011. On the 16th of August 2014 he, along with one "Simon", a non-employee, arrived at his place of work at 20:56 in a pick-up truck. Mr. Josef proceeded to collect various pieces of granite off-cuts and removed the material from the premises of his employer without consent to do so.

Once the matter came to the attention of management Mr. Josef was suspended. Later attempts to serve him with a notice of disciplinary hearing proved problematic as he could not be found. In the end a notice of hearing was forwarded to his Union, the MUN, and the hearing was scheduled to commence on 12 September 2014. The hearing did not commence on the 12th of September, but was again postponed to the 17th of September, presumably in an attempt to secure the Employee's attendance. This time the Union was informed that the Employee's suspension was being lifted and that he was to report for duty. On the 16th of September the Human Resource Officer of Stone Africa managed to get a hold of Mr. Josef on the telephone. At the time Mr. Josef informed her that he was on his way to South-Africa, where he had to tend to his wife who was ill. The Human Resource Officer informed Mr. Josef that he was no longer on suspension and that he needed to apply for leave at the office prior to departing for South-Africa. His subsequent failure to apply for leave resulted in a further charge of desertion/unauthorized absence being added to the existing charge when the hearing eventually commenced on the 6th of October 2014.

What made the matter especially interesting is the fact that a heated exchange took place at commencement of the hearing between the various parties in attendance. First the Chairperson was accused of being rude to the Union Official. Then the Human Resource Officer in turn accused Mr. Josef of being aggressive and racist. The result of these exchanges were that the Accused employee and his Union Official walked out of the hearing. They briefly returned sometime later, only for the entire process to repeat itself. They walked out a second time and did not partake in the hearing after that. Before they walked out of the hearing the Chairperson did however, manage to warn both the Union Official and the Accused Employee, that the hearing will continue in their absence and that such continuation in their absence may be to the Employee's detriment. They did not heed to the warning and the matter was concluded in their absence. Mr. Josef was found guilty of both charges and summarily dismissed.

Following his dismissal the Employee elected to refer the matter to the Office of the Labour Commissioner where the matter was arbitrated. The Employee however had little success as the Arbitrator ruled in favour of the Employer and found the dismissal to be, both substantively and procedurally, fair. Not content with this result Mr. Josef approached the Labour Court.

Now that we have the background to the matter, what are the aspects of importance to Namibian Employers? Allow me to elaborate.

1. The first charge related to the unauthorised removal of the granite and was formulated on the charge sheet as follows: "*Fails to comply with any provisions in the policy of the employer: in that on the 16th of August 2014 you wrongfully and unlawfully removed or attempted to remove off-cut granite, the property of the employer and without proper documentation as per the company policy .....*"

   As the charge was framed as a policy offence (as opposed to an act of dishonesty or theft,) Mr. Josef's representative made the argument that no evidence was led with regard to this policy. The argument being that either no policy exists or, if a policy did exist, it was not communicated to the Employee. The judge did not buy into this argument and his reasoning should offer comfort to employers who have found themselves on the receiving end of similar dishonest behaviour from within their own ranks. I quote from the judgement: "One does not need a policy to know that one must not take property that does not belong to you without the owner's permission".

2. During the Arbitration hearing the security guard who witnessed Mr. Josef and Simon enter the Employer's premises was not called to testify. It was not clear form the record why he/she was not called. In practice it is however, a common occurrence that Employers are left wanting when it comes to the availability of witnesses. As in this case, Arbitrations often commence a long time after the internal disciplinary process has been concluded. In this case it was approximately one year after the initial incident. Regrettably, from an employer's perspective, this often means that witnesses, who were employees at the time of an incident, may no longer be employed at the time their testimony is needed and may be hard, if not impossible to locate.

   In the absence of the Security Guard's testimony the Employer was left with an entry made by the Security Guard in the Occurrence Book, which read:

   "*Josef and Simon on Saturday around 8:56 – they came inside with a Toyota Hilux 4x4 Reg. No. N25484 SH and load up lot of small pieces of broken slabs they say that they buy the slabs the time in the office there was Mr. Jaap and he told me that Jacu he also know about this.*"

   As the guard did not testify during the proceedings Mr. Josef's legal representative argued that this evidence was hearsay and could not be relied on. The judge however was of a different opinion and made reference to section 133(3) of the Labour Act which reads:

   "In any legal proceedings in terms of this Act, a statement or entry contained in a book or document kept by an employer, or found upon or in any premises occupied by an employer, and any copy or reproduction (whether obtained by microfilming or any other process or by the use of a computer) of that statement or entry, is admissible in evidence against that employer as an admission of the fact stated in that statement or entry, unless it is proved that that statement or entry was not made by that employer, or any manager, agent or employee of that employer in the course and scope of their work.".

   Although not explicitly stated the Judge's reasoning seems to be that if the aforesaid documents can be used against the employer, it should in turn be available for use by the employer. To quote from his judgement:

   "I am of the view that a statement or entry contained in a book or document kept by an employer, or found upon or in any premises occupied by an employer, and any copy or

reproduction of that statement or entry, may be used by the employer to prove facts stated in that statement or entry".

The judge's ruling may offer some respite for employer's left in the predicament of being unable to ensure the attendance of former employees during arbitration proceedings.

3. With reference to the unreported judgement of the Supreme Court of Namibia, in the case of Leon Janse van Rensburg v Wilderness Air Namibia (PTY) Ltd., the judge emphasized that disciplinary proceedings are not criminal proceedings and that it is not governed by the same strict rules that apply to criminal proceedings. In essence fairness requires that an employee be given proper notice of, and the opportunity to respond to the factual issues relevant to the disciplinary hearing. This again applies to the Arbitration proceedings and an Arbitrator hears all evidence and arguments placed before him, regardless of the findings of an internal disciplinary hearing.

   Where an employee chooses not to partake in an internal disciplinary hearing it is important to note that it is the task of an Arbitrator to determine whether or not any referred dismissal was effected in accordance with a fair procedure and for a substantively valid reason. As such an employee who chose not to partake in an internal hearing will again be afforded an opportunity to respond to allegations against him/her during possible future Arbitration proceedings. For this reason it is of the utmost importance that disciplinary hearings proceed in a thorough and fair manner, even when proceeding in the absence of an employee who refused to partake,

4. Lastly, and of course the obvious point of Appeal for Mr Josef's legal team to challenge, was the procedural fairness of his hearing, seeing as it was concluded in his absence. This aspect is important from an Employer's perspective as it is not entirely uncommon for employees and their representatives to make it impossible to proceed with disciplinary hearings, despite the Employer's best efforts to comply with all procedural aspects related to the conducting of internal disciplinary matters.

   On behalf of Mr. Josef it was argued that he did not waive his right to be heard and that the Arbitrator failed to take proper consideration of the circumstances under which he "had" to leave the proceedings. Our law requires clear proof of a tacit waiver of rights and, according to Mr. Josef's representative, no such clear proof existed.

The judge concedes that clear proof is required when it comes to a tacit waiver of rights. According to him this is however a matter of fact, rather than a legal question, which shall be determined by the circumstances of each individual case. Applied to the merits of this particular matter the Accused employee received adequate notice of his hearing. He first attended and then walked out, returned and then walked out again. When he walked out the second time he was warned that the hearing will proceed in his absence, yet disregarded the warning and took no further part in the proceedings. According to the judge this is *"the clearest proof of a waiver of rights"*.

Even the argument that he walked out because he had a reasonable apprehension that the chairperson of the hearing would be biased did not sway the judge. In this regard the judge makes it abundantly clear that this reason alone would not suffice as the Employee has other legal remedies available to him. I quote from paragraph 49 of the judgement:

"I am of the view that even if the appellant had a reasonable apprehension that the chairperson of the disciplinary hearing will be biased he could not just walk out of the disciplinary hearing, because, if his apprehension was found to be reasonable there would in terms of section 48 be remedies available to him".

So there we have it. A case from which employers can certainly take heart.

ANNUAL PREMIUM INCREASE

All members are advised that an annual premium increase of 6% (Six Percent) will take effect on the 1st of September 2017. Members who joined us during June, July and August of 2017 will not be affected by this increase.

JUNIOR MANAGEMENT TRAINING

INTRODUCTION:

One of the most important elements that contribute to the profit and success of a business is the role of key staff at operational level. Especially junior managers and supervisors are critical in ensuring that the core operational activities of businesses ware managed effectively, for this impact directly on the bottom line of the company.

With the above in mind SEENA set forth to develop a Junior Management and Supervisor Training course aimed firstly at introducing these individuals to the principles of management, thereby providing them with a strategic insight and understanding of their core tasks, and secondly empowering them with a number of practical managerial skills which can be used daily, on an operational level, to ensure optimal performance.

COURSE CONTENT:

During this course the attendee will obtain a better understanding of his/her role and purpose in their Employer's business, they will be empowered with new competences and in many cases, existing skills and knowledge will be refreshed. The subjects we explore during this course are as follows:

- Managers and Management
- Vision, Mission and Values of the Company
- Management Functions
    - Leadership,
    - Planning,
    - Organisation and
    - Control

- General Management Skills
    - Decision Making;
    - Conflict Management;
    - Time Management;
    - Effective Communication;
    - Report Writing;
    - Interviewing Techniques and
    - Effective Meetings.

Should you be interested in attending one of our training courses or sending a delegate on your behalf, please do not hesitate to contact us for a booking.
Our details are as follows:

Contact Person:	Sonja van der Merwe		
Telephone:	061 309 260		
Fax:	061 309 266		
E-mail:	training@seenalegal.com		
Cost:	Non-Members	-	N$ 1 430.00 (Incl. Vat.)
	Members	-	N$ 1 100.00 (Incl. Vat.)
Duration:	09:00-15:00 (Light Lunch & Attendance Certificate included)		

Remember that we have limited seating - first come first served. Your seat will only be confirmed once payment is received.

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