

Dear SEESA Client

In this newsletter we will be discussing the following topics:

- BBBEE: Enterprise development, an element with huge potential ①
- Retrenchment of an employee by a labour broker at the client's request ②
- Understanding the consumer's basic rights in terms of present legislation ③
- SEESA Training ③

BBBEE: ENTERPRISE DEVELOPMENT, AN ELEMENT WITH HUGE POTENTIAL

The government's Broad Based Black Economic Empowerment (BBBEE) policy encourages businesses to empower black people through the following:

1. Ownership
2. Management and Control
3. Employment Equity
4. Skills Development
5. Preferential Procurement
6. **Enterprise Development**
7. Socio Economic Development

The scorecard consists of these seven elements, and generic businesses should comply with the requirements imposed by each of them. **Enterprise Development**, being one of the elements, is the assistance that is given to black owned entities that are struggling to expand their businesses or starting in business.

There is often significant misunderstanding with Enterprise Development (ED), and as a result, businesses are reluctant to elect this element as they are uncertain of what ED entails.

ED entails many different aspects. It can be the formation of new entities, or the redevelopment and funding of existing entities. ED can be worthwhile as it counts 15 points on the Generic and 25 points on the Qualifying Small Enterprise scorecards. Besides improving scorecard ratings, ED also creates sustainable business opportunities for black South Africans by providing them with essential tools, expertise and finances. These emerging enterprises depend mainly on government grants to grow, but as these grants are often not forthcoming they need additional support. Established businesses through their ED programmes can provide this much needed assistance.

Many businesses are unaware that they are practicing ED on a daily basis, however as they are not keeping proper documentation of the assistance, it cannot be considered for BBBEE purposes. The legal consultants of SEESA BEE are here to assist businesses with the advice and procedures that need to be adhered to when selecting this element.

ED is a vital element as it ensures the growth of the economy and assists in the fair distribution of South Africa's wealth.

RETRENCHMENT OF AN EMPLOYEE BY A LABOUR BROKER AT THE CLIENT'S REQUEST

1. In the past it was standard practice to retrench an employee if a client requested or demanded the removal of the employee, and where the employer was unable to accommodate the employee elsewhere. A recent Labour Court case involving a Labour Broker has, however, indicated that such retrenchments are substantively unfair, unless the employer had met certain conditions. The said case may also affect service providers where a client/employer relationship exists.

2. In Simon Nape v INTCS Corporate Solutions (Pty) Ltd JR617/07 (2010) the facts were as follows:
 - 2.1 The applicant committed an act of misconduct by sending an e-mail containing offensive material to another individual. Nissan (the client), invoking its contractual rights, demanded that the respondent (labour broker) remove the applicant from Nissan's premises.
 - 2.2 The respondent, after a disciplinary hearing, determined that a final written warning instead of dismissal was an appropriate sanction. Nissan was not satisfied and refused to allow the applicant access to its premises.
 - 2.3 The respondent invoked the provisions of section 189(a) of the Labour Relations Act (LRA), and after a consultation meeting with the applicant found no alternative position for the employee, who was then retrenched.
3. The judge held the dismissal to be procedurally fair but substantively unfair.
4. Section 198(4) of the LRA makes the client and labour broker jointly and severally liable to the employee, but not in cases of dismissal. Where the employee is dismissed, the employee's course of action is only against the labour broker and not against the client.
5. The judge held that the respondent's argument rested on the following two pillars:



1 The client acted lawfully in terms of the contract when it could no longer tolerate the employee's presence on the premises.

2 The labour broker was powerless and could do nothing in response.

5.1 PILLAR 1 - The contract

- 5.1.1 In Barkhuizen v Napier 2007 (7) BCLR 691 CC it was held that "while public policy endorses the freedom of contract, it nevertheless recognizes the need to do simple justice between the contracting parties. To hold that a court would be powerless in these circumstances would be to suggest that the hands of justice can be tied".
- 5.1.2 In SA Post Office v Mameule (2009) 30 ILJ the court held that contractual rights cannot be structured in a way which would undermine the fundamental protections guaranteed to employees by the LRA.

- 5.1.3 The labour broker and the client are not at liberty to structure their contractual relationship in a way that would effectively treat employees as commodities to be passed on and traded at the whims and fancies of the client.
- 5.1.4 Any clause in a contract between a labour broker and a client which allows a client to undermine the right to be fairly dismissed would be against public policy.
- 5.1.5 Section 189 of the LRA cannot be used to disguise the true reasons for dismissal.
- 5.1.6 Where the demand of the client for the removal of the employee is lawful and fair, the labour broker may rely on the provisions of section 189 of the LRA.
- 5.1.7 From the above it can be deduced that the judge found the client's demand for removal of the employee to be unlawful and unfair. The judge held that the client had no right to impose its employment policies on the labour broker where the application of these policies conflicted with the right to be fairly dismissed.

5.2 PILLAR 2 - The labour broker was powerless

- 5.2.1 According to the judge, the labour broker was not powerless. The latter is entitled to approach a court of law to compel the client not to insist upon the removal of an employee where no fair (bona fide) grounds exist for that employee to be removed.
- 5.2.2 The labour broker is also entitled to resist any attempt by the client to enforce a contractual provision which is against public policy.
- 5.2.3 The labour broker could approach either the High Court or the Labour Court for appropriate relief.
- 5.2.4 In Mnguni v Imperial Truck Systems (Pty) Ltd t/a (2002) 23 ILJ 492 (LC) it was held that the employer had to take all reasonable steps to persuade its client to drop the request. The court also found that there was no proof that the client would have cancelled the contract had the employer insisted that the employee continue working.
- 5.2.5 "A labour broker may avoid dismissal altogether if it acts expeditiously, and refuses to comply with the client's requests."

6. Will the above judgment have an effect on service providers, inter alia cleaning and security service providers?

Should a dismissal be the result of a request or demand (legal, fair, illegal or unfair) from a contract client to remove an employee, the dispute will definitely be judged in light of the above mentioned case. The said case would be applicable if the employer's argument is based on the TWO PILLARS:

- 1 - A contractual agreement with a client and the latter's demand for the removal of the employee;
- and
- 2 - The employer was powerless and could do nothing in response.

7. How should one deal with these cases in light of the latest Labour Court case?

- 7.1 We advise that a policy or clause be added to the employment and client's contracts stipulating that the employee would be subject to his/her employer's disciplinary code of conduct as well as the code of a client/third party, should the employee render his/her services on the client/third party's premises. Whether such a policy or clause will be viewed legal and/or fair has yet to be established.
- 7.2 Retrenchment should not be used to disguise the real reason for dismissal.
- 7.3 The onus on the employer to find an alternative position for the employee will be heavier.
- 7.4 The employer must make vigorous attempts to persuade the client to allow the employee to continue working – in writing and/or minuted meetings with the client.
- 7.5 Remember that should a client's demand be legal and/or fair, we shall still be able to terminate the employee's services (misconduct, poor performance, retrenchment, etc).
- 7.6 The employer may approach a court for an interdict/mandamus compelling the client to allow the employee to continue working. This, however, should only be used as a last resort.

UNDERSTANDING THE CONSUMER'S BASIC RIGHTS IN TERMS OF PRESENT LEGISLATION

Consumers have the right to file a complaint with the Office of Consumer Protection (OCP). It is therefore important to understand the basic rights of consumers, such as:

1. **Consumer education** – Consumers must be able to acquire the knowledge and skills needed to make informed decisions and confident choices about goods and services, while being aware of basic consumer rights and responsibilities and how to act on them.
2. **Disclosure and information** – Consumers must be provided with the facts needed to make informed choices, and to ensure that they are protected against dishonest or misleading advertising and labelling.
3. **Choice** – Consumers should be able to choose from a range of products and services offered at competitive prices, with the assurance of satisfactory quality.
4. **Representation** – Consumer interests should be represented in the making and execution of government policy, as well as the development of products and services.
5. **Redress** – Consumers must receive a fair settlement of just claims, including compensation for misrepresentation, inferior goods or services.
6. **Safety** – From a trade and industry perspective, consumers should be protected against production processes, and products and services that are dangerous to health or life.
7. **A healthy environment** – Consumers should be able to live and work in an environment that is not threatening to the well-being of present and future generations.
8. **Access to basic needs and services** – Consumers should have access to basic goods and services such as adequate food, clothing, housing, health care, education, clean water and sanitation.

It is important for distributors, manufactures, retailers, importers and service providers to respect these consumer rights, and ensure that they are addressed with every transaction concluded.

SEESA Consumer Protection assists businesses with consumer complaints. We ensure that company documentation, marketing material and practices comply with the Consumer Protection Act 2008.

Should you have any enquiries, please do not hesitate to contact Fritz Thirion at 012-810 2000.

SEESA TRAINING

Due to numerous requests from clients, SEESA has decided to revive its training services. SEESA believes in empowering individuals and institutions with knowledge and skills to optimise their business practises and profitability. Envisaged training programmes include: Labour Law, Occupational Health and Safety, Life Skills and HIV / Aids. For any enquiries regarding scheduling for the above training please contact Elrien Potgieter at (012) 810-2000.