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EMPLOYMENT ALERT

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"Mechanical thinking is anathema to our Law": Substance over form when it comes to compliance with Rules

In *Revon Adams v the National Bargaining Council For The Freight and Logistics Industry and Others* (CA2/2019) [2020] ZALAC 10 (18 May 2020), the Labour Appeal Court was tasked with determining the significance of who signs the prescribed forms referring a dispute to conciliation and arbitration under the auspices of the Bargaining Council for the Road Freight and Logistics Industry (Council).

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In Revon Adams v the National Bargaining Council For The Freight and Logistics Industry and Others (CA2/2019) [2020] ZALAC 10 (18 May 2020), the Labour Appeal Court was tasked with determining the significance of who signs the prescribed forms referring a dispute to conciliation and arbitration under the auspices of the Bargaining Council for the Road Freight and Logistics Industry (Council)

Adams referred an unfair dismissal dispute to the Council. The referral form was signed by his attorney. The employer did not appear at the conciliation proceedings and a certificate of non-resolution was issued. The referral to arbitration was further signed by Adams' attorney. The employer raised a point *in limine* that the Council had no jurisdiction to hear the matter and relied on Rule 6.1 of the Council rules in terms of which, only a person entitled to represent the referring party in the arbitration proceedings is entitled to sign the referral. The point *in limine* was upheld on the basis that the referral was not signed by Adams and that his attorney did not have an automatic right represent him.

On review, the Labour Court held that the signature of a referral document by any person not entitled to do so, is just the same as no signature at all. The Labour Court referred to the judgment of *Vac Air Technology (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2006) 27 ILJ 1733 (LC) at para 14, in which it held that papers before the Labour Court signed by a person who does not fall within the permitted category are null and void, and proceedings relating thereto are also null and void. The Labour Court held that the same considerations should apply to the Council. The Labour Court further referred to the decision of *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & Others* where the Labour Court found that failure by the referring party to personally sign a referral to conciliation constituted a material defect which deprived the CCMA (and a bargaining council) of the jurisdiction to hear the dispute.

Adams instituted appeal proceedings in the Labour Appeal Court and argued that the irregularity could be overcome by the aggrieved employee participating in the subsequent hearing. Adams relied

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“Mechanical thinking is anathema to our Law”: Substance over form when it comes to compliance with Rules...continued

In the Labour Appeal Court’s view, the function of the rule is the paramount consideration and, where it can be safely found that the purpose of the rule is achieved, it is highly undesirable to approach the matter in a literalist way.

on the *ABC Telesales v Pasmans* [2001] 4 BLLR 385 (LAC) case where the Labour Appeal Court held that where a party does not personally sign the prescribed form but thereafter appears at the convened proceedings, such conduct amounts to a quasi-ratification which satisfies the record for proof of justification.

In dealing with Rule 6.1 of the Council rules, the Labour Appeal Court held that the purpose of the rule was to eliminate the risk of an unauthorised referral. The appearance of the aggrieved employee in the arbitration proceedings was clear proof that the referral was not unauthorised. It held that the *ABC Telesales* judgment was

sound authority for the Adams’ proposition that the purpose of the signature rule was achieved by the ratification of the aggrieved person’s agent signing the referral.

According to the court, the fact that it was an attorney who signed the referral was a non-material fact. In the Labour Appeal Court’s view, the function of the rule is the paramount consideration and, where it can be safely found that the purpose of the rule is achieved, it is highly undesirable to approach the matter in a literalist way.

Fiona Leppan, Bheki Nhlapo and Kgodisho Phashe

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EMPLOYMENT

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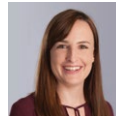
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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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