

SO WHAT PROTECTION IS THERE FOR EMPLOYERS

The Constitution, ¹ states “Everyone is equal before the law and has the right to equal protection and benefit of the law” and “Equality includes the full and equal enjoyment of all rights and freedoms” ² and further, “everyone has the right to fair labour practices”. ³

The constitution further states, “A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person”. ⁴

Does this mean, that as long as the nature of the right makes it possible for the juristic person to benefit from the right, the juristic person is entitled to it. If so, it would mean employers should have the right to fair labour practices by employees and should be able to sue employees in the CCMA for breaching such rights.

The Labour Appeal Court , however, disagrees.

In *National Entitled Workers Union v Commission for Conciliation, Mediation & Arbitration & others [2007] 28 ILJ 1223 (LAC)* considered whether, by failing to provide employers’ with a remedy for unfair labour practices perpetrated against them by employees while providing such a remedy for employees, the provisions of the Labour Relations Act 1995 and the Employment Equity Act 1998 offended against the employer’s constitutional right to equity before the law. The court concluded that they did not. In the court’s view the need for such legislation had not arisen because employers have greater social and economic power than individual workers, and do not require greater protection than that already available to them in terms of the BCEA 1997 and at common law.

The Court concluded, that legislation that would give employers protection “...would be step backwards in the field of labour relations and employment law in our country.”

If employers can not depend on the law, ⁵ how, then must employers protect themselves in a way that conforms with the law on the one hand, but is effective on the other hand?

Employers will have to implement systems, strategies and mechanisms for protecting themselves. These systems and mechanism must themselves comply with labour laws in order to avoid infringing the myriad of employee rights contained in eight labour acts, countless labour regulations, codes and a multitude of court decisions.

¹ S 9(1) Bill of Rights

² S 9(2) Bill of Rights

³ S 23(1) Constitution

⁴ S 8(4) Constitution

⁵ Labour Relations Act & other Labour legislation

Such protection systems, strategies and mechanisms might include:

- Developing a thorough, comprehensive and in-depth understanding of all aspects of labour law;
- Ensuring that all managers and supervisors who hire, manage and fire employees have a clear understanding of what they may and may not do in carrying out their duties;
- Ensuring that all managers and supervisors are trained in the knowledge and skill required to manage employees in line with the law but, at the same time, in line with the principles of effective management;
- Developing human resources policies, procedures and rules that guide management in controlling employees both effectively and in accordance with the law;
- Ensuring they have, within easy reach, reputable experts in employee relations and labour law who are able to guide employers in developing the above systems and to advise the employer in cases of employee misconduct, discipline, retrenchment, takeovers, mergers, trade union recognition, wage negotiations and possible CCMA disputes.