#KoSpaneng

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GAMBLING WITH EQUITY

A WIN FOR THE EMPLOYEE

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If you missed episode 1, click here to catch up.

The context of this article is that you have fired an employee on notice, because the contract of employment allows it; only to discover the contrast between your contractual rights and the language of equity.

The sad reality is that in Botswana, your fate as an employer faced with an aggrieved former employee, lies in the employee's choice of forum between the High Court and the Industrial Court. These courts rank equally in jurisdiction, but employ different principles, which can present markedly different risk profiles for employers.

In this article we show you what the courts consider and provide advice on what you should do as an employer.

In **Khoemecau Copper Mining (Pty) Ltd v. Wallace**, the Court of Appeal highlighted some of the differences between the two courts as being that:

1. The High Court applies the common law and the Employment Act, while the Industrial Court applies the Trade Disputes Act ("**TDA**")on equitable principles and considers any policy guidelines or Code of Good Practice.

2. Legal costs are ordinarily awarded to the successful party in the High Court, whereas the Industrial Court does not make orders as to costs, except when it is minded to demonstrate its displeasure with a litigant's conduct.

3. While the High Court may only award damages according to the common law and in accordance with the Employment Act for wrongful dismissal, the Industrial Court is empowered by the TDA to award equitable compensation on various grounds.

It stands to reason that for an employee, it makes more financial and legal sense to seek recourse before the Industrial Court. After all, that court was specifically designed to safeguard and promote employee rights and, in that environment, employees essentially play with house money, so to speak.

Say what?! So what does an employer do? Is it all doom and gloom?

In order to adequately manage the financial and legal risk endemic to every termination of a contract of employment on notice, and the high probability of an employee approaching the Industrial Court for recourse, we suggest that employers ensure that there is just cause for terminating an employee's contract of employment.

Huh?! Why?

We suggest this for the simple reason that the scales of equity will tilt in favour of the employee if termination of a contract of employment was on notice, presuming that a claim is lodged with the Industrial Court. In that court, the exercise of a contractual right to terminate on notice will not meet the threshold of substantive and procedural fairness.

Substantive and provisional what...?

Yes. Substantive and procedural fairness. Catch us in the next episode of **#KoSpaneng** as we explore this and explain how it can be incorporated into the termination process as a risk-management measure.

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