CAN THE EMPLOYER UNILATERALLY VARY EMPLOYMENT TERMS AND CONDITIONS - *(Moemedi Tafa, Partner)*

Employers are, more often than not, faced with difficult situations in the workplace which may bring about the need to vary employment terms and conditions agreed to with employees/unions.

This, however, is by no means a simple task to give effect to.

When an employer and employee(s) enter into a contract of employment, they agree to a set of terms and conditions that will govern their working relationship. They agree as to how many hours to work in a day, as to what services are to be rendered, where the services will be rendered, how they will be rendered, how much the employee will be remunerated and many other factors.

As with any contract, it is expected (and accepted) that parties to a contract shall remain bound to what they have agreed to. Otherwise, it would be pointless to ever "agree" to anything if it could simply be discarded and disregarded.

Are employment contracts any different?

Our Courts have accepted a fundamental reality with respect to the employer-employee relationship. Our Courts have accepted that an employment relationship is dynamic in nature and cannot remain static.

It has been accepted that circumstances will undoubtedly arise which will compel an employer to change the way in which it conducts business affairs and, as a consequence, find it inherently necessary to vary agreed terms with employees.

The vexing question, however, is whether an employer may unilaterally proceed to doing so. What happens if an employer needs to vary contractual terms but the employee refuses? Can the employee hold the employer at ransom in its own business? Who has the final say and what risks arise from that say?

Several cases have been put before our Courts on these questions, and the golden thread has remained consistent in all decisions. In confirming that indeed an employer may unilaterally vary terms and conditions of employment, certain conditions are however, to be met in order to clothe the said variations with lawfulness.

The position was well-summed-up in the case of **Ntlo ya Kgosi vs Central Automative Aircons and Repairs (Pty) Ltd – 2010 (2) BLR 49**, in which the Court held that:

"at common law, an employer could not unilaterally change the conditions of an employee's contract of employment… However, in terms of labour law, an employer was permitted to unilaterally amend an employee's contract of employment provided:

a) It had a sound commercial reason; and

b) The amendment was proceeded by fair procedure, which meant proper consultations with the employee concerned."

This position was recently reiterated and confirmed by the Industrial Court in its decision of **Botswana Mine Workers Union v Debswana Diamond Mining Company (Pty) Ltd – ICF 318/16**, in which Armstrongs successfully acted for Debswana.

The unique facts and circumstances of each case will, however, determine whether or not the acts of the employer could be held as being lawful.