

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Conciliation Proceedings — Referral of Dispute

The employer dismissed several hundred employees for participation in an unprotected strike. The applicant union referred an unfair dismissal dispute to the relevant bargaining council, which issued a certificate of non-resolution. Meanwhile, the employer re-employed several dismissed employees, but none of the union's members. It considered that this constituted selective re-employment and a dismissal in terms of s 186(1)(d) of the LRA 1995, and referred a second dismissal dispute to the bargaining council. The conciliating arbitrator disagreed with the employer that the council had no jurisdiction, and issued a certificate of non-resolution in respect of this dispute also. The employee sought to review the jurisdictional ruling. The union referred two dismissal disputes to the Labour Court, alleging *inter alia* that its members were dismissed because of their union affiliation and that the dismissals were therefore automatically unfair in terms of s 187(1)(f). The employer raised two preliminary points — firstly, that an automatically unfair dismissal had not been conciliated and the court therefore lacked jurisdiction, and secondly, it raised the defence of *lis alibi pendens*, claiming that the issues raised in the second claim were the subject of its review application then pending before the Labour Court. The court upheld both points and the Labour Appeal Court dismissed a petition for leave to appeal. The Constitutional Court, dealing with the Labour Court's alleged lack of jurisdiction because of the failure to refer an automatically unfair dismissal dispute for conciliation, pointed out that what was required to be referred for conciliation was a dispute and not a cause of action or a claim arising from the dispute. By characterising an automatically unfair dismissal as a dispute separate from an unfair dismissal dispute, the Labour Court had overlooked the fundamental issue, namely that what was referred to conciliation was the unfairness of the dismissal, regardless of whether the unfairness concerned was automatic or otherwise, and that was what had to be referred to conciliation. The reason for a dismissal did not itself constitute a dispute. The certificate of non-resolution issued by the bargaining council was sufficient proof that there had been an attempt to resolve the actual dispute by way of conciliation. The Labour Court had therefore erred in finding that it did not have jurisdiction. As far as the issue of *lis alibi pendens* was concerned, the court reaffirmed the requirements of that defence and found that only one of those requirements had been satisfied in this case and that was that the litigation was between the same parties. The review application had been aimed at impugning the council's jurisdictional ruling and the certificate of non-resolution.

It had nothing to do with the fairness of the second dismissals. The Labour Court had therefore also erred in upholding the defence of *lis alibi pendens* (*Association of Mineworkers & Construction Union & others v Ngululu Bulk Carriers (Pty) Ltd (in liquidation) & others* at 1837).

The applicant employee had referred a dispute to the CCMA claiming that his dismissal was automatically unfair, the dispute remained unresolved and a certificate of non-resolution was issued. The employee then delivered a second dispute referral form in respect of the same dismissal, this time claiming that his dismissal was for unknown reasons. The CCMA commissioner ruled that, having already dealt with the dismissal and issued the necessary certificate of outcome, he was *functus officio* and had no jurisdiction to arbitrate the second dispute. The Labour Court upheld this ruling on review. On appeal the Labour Appeal Court expressed doubt that a decision on jurisdiction constituted *res judicata*. However, in respect of the principle of *lis alibi pendens*, it identified the issue as whether both the CCMA and the court *a quo* were confronted with the same dispute, a single act of dismissal of the employee by the employer. Referring to the recent Constitutional Court decision in *Association of Mineworkers & Construction Union & others v Ngululu Bulk Carriers (Pty) Ltd (in liquidation) & others* above, the court pointed out that it was the alleged unfairness of a dismissal that constituted the dispute to be referred to conciliation rather than the reasons for the dismissal. There was only one dismissal in this matter and the doctrine of *lis pendens* could therefore be appropriately invoked (*Feni v Commission for Conciliation, Mediation & Arbitration & others* at 1899).

Organisational Rights — Legal Standing of Unions

The Constitutional Court has upheld the Labour Appeal Court's finding in *Lufil Packaging (Isithebe) (A Division of Bidvest Paperplus (Pty) Ltd) v Commission for Conciliation, Mediation & Arbitration & others* (2019) 40 ILJ 2306 (LAC) that, where employees are precluded by a union's constitution from becoming members of the union, the purported admission of such employees as members is *ultra vires* and invalid. In this matter, the employees on whom the union, NUMSA, relied in alleging that it was sufficiently representative to obtain organisational rights, could not be admitted as members of NUMSA as they did not fall within the scope of NUMSA's constitution. As such NUMSA was not sufficiently representative at the workplace and was, therefore, not entitled to organisational rights (*National Union of Metalworkers of SA v Lufil Packaging (Isithebe) (A Division of Bidvest Paperplus (Pty) Ltd) & others* at 1846.)

Local Government — Appointment of Manager

The High Court has found that, on a proper interpretation of s 56(2) of the Local Government: Municipal Systems Act 32 of 2000, which provides that the appointment of a person without the requisite skills, expertise, competencies or qualifications as an acting manager will be null and void, is also applicable to the appointment of a permanent manager (*Moerane v Buffalo City Metropolitan Municipality & others* at 1869).

Agency Shop Agreements — Validity

In *Municipal & Allied Trade Union of SA v Central Karoo District Municipality & others* (at 1918) the Labour Appeal Court found, in a dispute concerning the validity of an agency shop agreement, that the meaning and effect of s 25 of the LRA 1995 were clear and unambiguous — the provision in s 25 for any agency fee to be deducted 'from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof' could not be interpreted textually to exclude employees who belonged to and paid subscriptions to another union. The court further restated the distinction between an

agency fee and a union membership fee, and confirmed the decision of the Labour Court (*Municipal & Allied Trade Union of SA v Central Karoo District Municipality & others* (2019) 40 ILJ 386 (LC)) which found that where minority unions have been granted certain organisational rights by the CCMA, this did not render agency shop agreements unlawful or invalid merely because members of the minority unions had to pay both subscriptions to their union and agency fees to majority unions.

In *National Union of Metalworkers of SA v Transnet (SOC) Ltd & others* (at 1977) the Labour Court found that an agency shop agreement that referred to the representative union in the ‘bargaining unit’ and not the ‘workplace’ as contemplated in s 25(2)(a) of the LRA 1995 was an error and that such error did not invalidate the agreement. Moreover, the agreement had been rectified to correct the ambiguity. The agreement was in substantial compliance with the requirements of s 25 and was therefore valid.

Unfair Discrimination — Age

The employee claimed, inter alia, that he had been unfairly discriminated against on the ground of age when he was compelled to retire at age 60 and not 65. The Labour Appeal Court found that it was clear from the employee’s conduct and his unchallenged evidence that he had never consented to the change of his retirement age, and that he had been unfairly discriminated against on the ground of his age. The court found further that his dismissal was also automatically unfair in terms of s 187(1)(f) of the LRA 1995 (*BMW (SA) (Pty) Ltd v National Union of Metalworkers of SA & others* at 1877).

Unfair Discrimination — Disability

The employee firefighter had been permanently injured on duty. He retained his status and pay as firefighter and was accommodated by the appellant city in an administrative post. When he applied for advancement to the position of senior firefighter, he did not pass the fitness assessment required in the city’s advancement policy and was denied promotion. The Labour Court found that he had been unfairly discriminated against on the ground of disability. On appeal, the Labour Appeal Court found that fitness was an inherent requirement of the job of firefighter and that the employee did not meet the inherent requirement. The city’s policy was not discriminatory and no discrimination had been proved (*City of Cape Town v SA Municipal Workers Union on behalf of Damons* at 1893).

In *Health & Other Services Personnel Trade Union of SA on behalf of Mdluli and Department of Health Pholosong Hospital* (at 1986) the CCMA commissioner found that the mere fact that disabled applicants were scheduled for interviews for promotion at the start of the day did not amount to discrimination on the ground of disability. The employer’s intention had been to make reasonable accommodation for disabled persons and not to prejudice them.

Unfair Discrimination — Pregnancy

The employer mine’s policy on pregnancy stipulated that the mine had to endeavour to place an employee engaged in high-risk work in suitable alternative employment during her pregnancy and if no suitable alternative could be found the employee would be placed on unpaid leave. The policy also provided that an employee who fell pregnant twice in a three-year cycle was not entitled to paid maternity leave. The employee, who fell pregnant for the second time in three years, was immediately placed on unpaid leave despite the fact that an alternative position was available and had been given to another employee who fell pregnant after the employee. The Labour Appeal Court found that the mine differentiated against the employee for falling pregnant twice within a three-year cycle and this differentiation amounted

to discrimination. The employee was entitled to payment for the period from the time she was taken off high-risk work until she went on unpaid maternity leave (*Mahlangu v Samancor Chrome Ltd (Eastern Chrome Mines) & others* at 1910).

Unfair Discrimination — Arbitrary Ground

The Labour Court dismissed an unfair discrimination application by the employees in which they claimed that they had been remunerated less favourably than other employees employed after them despite the fact that they performed the same work (*Naidoo & others v Parliament of the Republic of SA* (2019) 40 ILJ 864 (LC)). On appeal, the Labour Appeal Court found that the part of s 6(1) of the Employment Equity Act 55 of 1998 to which meaning had to be attributed in this matter was not the word ‘arbitrary’, free from its context and function, but the phrase ‘any other arbitrary ground’. The section did not outlaw arbitrariness itself, but unfair discrimination rooted in ‘another’ arbitrary ground. The court therefore endorsed the narrow interpretation adopted by the court below, namely that, in order for an alleged ground of arbitrary discrimination to qualify as such, it must, objectively, constitute a ground based on attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner to a listed ground (*Naidoo & others v Parliament of the Republic of SA* at 1931).

In *National Union of Mineworkers on behalf of Pandle and Harmony Gold Mining Co Ltd* (at 2001) the CCMA commissioner found that the employer’s practice of ‘flagging’ employees who had been dismissed for serious offences and thereby preventing them from applying for a position at any of the employer’s operations for life, constituted unfair discrimination on an arbitrary ground.

Unfair Discrimination — Race

In *Pillay and Newcastle Municipality* (at 2012) the CCMA commissioner found that the employee, an Indian female, had not been discriminated against on the ground of race when she was not appointed to a position at the respondent municipality. Although there had been defects in the appointment process, there was no causal nexus between these defects and the employee’s race — she had been scored according to the municipality’s employment equity plan and had simply fared poorly in the interview.

Unfair Discrimination — Compensation and Damages

In *BMW (SA) (Pty) Ltd v National Union of Metalworkers of SA & others* (at 1877) the Labour Appeal Court considered the distinction between compensation in terms of s 50(2)(a) and damages in terms of s 50(2)(b) of the Employment Equity Act 55 of 1998. Similarly, in *Jordan & others and Department of Labour* (at 1995), the CCMA commissioner considered the distinction between compensation and damages in terms of s 50(2). She found that the employees had proved unfair discrimination relating to pay differentiation and were entitled to claim damages and compensation. Although the employees failed to prove actual loss, they were nonetheless entitled to compensation for the indignity suffered as a result of the unfair discrimination.

Unfair Discrimination — Liability of Employer

In *Samka v Shoprite Checkers (Pty) Ltd & others* (at 1945) the Labour Appeal Court confirmed the Labour Court’s finding (*Shoprite Checkers (Pty) Ltd v Samka & others* (2018) 39 ILJ 2347 (LC)) that an employer can only be held liable in terms of s 60 of the EEA for the discriminatory actions of its employees. It therefore agreed with the court below that an employer was not liable for the conduct of a customer who had racially abused one of its employees.

Strike — Essential Service — Interdict

The Labour Court confirmed an interdict prohibiting ambulance employees employed by the applicant municipal medical emergency services from refusing to respond to emergency calls, finding that the obligation to respond to emergencies formed the core of the employees' contractual duties and that their refusal to perform fell within the definition of a strike (*City of Johannesburg v Democratic Municipal & Allied Workers Union of SA & others* at 1959).

Strike — Picketing Rules — Covid-19

A CCMA commissioner called upon to draft picketing rules during a strike at the applicant company, considered whether regulation 37 of the regulations in terms of the Disaster Management Act 57 of 2002, which prohibited gatherings unless 'for work purposes' during the level 3 lockdown, was applicable to workers engaged in a picket. He found that the phrase 'work purposes' in regulation 37, analysed within the employment law context, did not prohibit employees from picketing — strikes and picketing were essential tools for workers and depriving workers of such fundamental rights whilst permitting work to continue shifted the balance of power within the employment relationship and removed the fundamental basis of collective bargaining. The commissioner issued guidelines to ensure that picketing was conducted with due regard to the relevant health and safety protocols relating to Covid-19 (*Swan Plastics CC and National Union of Metalworkers of SA* at 2025).

Trade Union — Deregistration

In an application to stay a decision of the Registrar of Labour Relations to deregister the applicant union pending the outcome of an appeal in terms of s 111 of the LRA 1995, the Labour Court found that s 111(5) did not preclude the suspension of deregistration pending appeal (*Democratic Municipal & Allied Workers Union of SA v Registrar of Labour Relations* at 1968).

Basic Conditions of Employment Act 75 of 1997 — Annual Leave

In *Bronner v Alpha Pharm (Pty) Ltd & another* (at 1952) the Labour Court confirmed that s 20, read with s 40 of the Basic Conditions of

Employment Act 75 of 1997, contemplates payment only in respect of annual leave accrued in the year immediately preceding that during which the termination of employment takes place.

Practice and Procedure

In *Kopanong Local Municipality & another v Mantshiyane* (at 1907) the Labour Appeal Court confirmed that orders for personal costs or costs de bonis propriis against persons acting in a representative capacity are inherently punitive and, in the absence of a prayer for such a costs order, it is incumbent on the court to act fairly by first inviting representations why such an order should not be made.

Quote of the Month:

Sutherland JA in *Naidoo & others v Parliament of the Republic of SA* (2020) 41 ILJ 1931 (LAC), commenting on the thesis that the phrase ‘any other arbitrary ground’ in s 6(1) of the Employment Equity Act 55 of 1998 has to be saved from redundancy, and thus that it has to be understood to add something distinctive to the listed grounds — the addition of a fresh class of grounds that is amorphous and is knowable simply by the external manifestation of capriciousness:

‘This is a radical idea. It would make s 6(1) a font of a remedy for grievances with virtually no limits. But the EEA is not intended to be a catch-all or a panacea. Indeed, the EEA is the instrument of s 9 of the Constitution and therefore its mission is to give teeth to that constitutional guarantee within the scope of the terms expressed in that section. Section 9 is not an all-encompassing injunction, rather its purpose is to give recognition to the value of our humanity and provide a remedy for aggression against us on the grounds of our intimate attributes, whether inherent or adopted. In other words, s 9 has a specific and concrete focus, intelligible within the context of the historical experience of South Africa’s legacy of oppression. The writers, Garbers and Le Roux, rightly caution against being seduced by the idea that anti-discrimination law can be weaponised to solve all labour market ills. Other vicissitudes of life find remedies elsewhere, not least of all in the panoply of protections in labour legislation.’