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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Reinstatement

The Labour Appeal Court has, in *City of Johannesburg & another v Independent Municipal & Allied Trade Union on behalf of Erasmus & another* (at 1191), found that an employer may refuse to reinstate an employee if the employee does not make a valid tender to perform his services within a reasonable time of the reinstatement order.

In *Kubeka & others v Ni-Da Transport (Pty) Ltd* (at 1312) the employer had not reinstated the applicant employees in terms of a reinstatement order, and the employees instituted a contractual claim for backpay. The Labour Court found that, as the reinstatement order which covered the period from dismissal to date of the reinstatement order was an order ad factum praestandum, it was enforceable only through contempt proceedings. The employees had pursued an incorrect process by claiming a contractual debt rather than instituting contempt proceedings, and their claim was therefore dismissed. The court found further that the employees' claim for backpay from date of the reinstatement order to the final denial of the employer's application for leave to appeal, was a contractual debt that only became due once the employer had reinstated the employees, which had not happened in this case.

Protected Disclosures Act 26 of 2000

The Labour Appeal Court has found that disclosures made by a director in a letter to the board of directors where all the facts disclosed in the letter were known by every director, member of management and the company's auditors, did not constitute protected disclosures as envisaged in the Protected Disclosures Act 26 of 2000 (*Goldgro (Pty) Ltd v McEvoy* at 1202).

In *TSB Sugar RSA Ltd (now RCL Food Sugar Ltd) v Dorey* (at 1224), the Labour Appeal Court considered the meaning of 'on account or partly on account of' in s 3 of the PDA. It found that a finding that an employee was subjected to an occupational detriment 'on account of' having made a protected disclosure will be based on a conclusion that the sole or predominant reason or explanation for the occupational detriment was the protected disclosure; whereas a finding that an employee was subjected to an occupational detriment 'partly on account of' having made a protected disclosure will be to the effect that the protected disclosure was one of more than one reason for the occupational detriment. Section 3 of the PDA thus casts the net wide — if there is more than one reason for a dismissal, the PDA will be contravened if any one of the reasons for the dismissal is the employee having made a protected disclosure.

Collective Bargaining — Bargaining Levels

Where a bargaining council constitution prohibited plant level bargaining on matters of mutual interest and prohibited strike action until a dispute had been dealt with at central level, the Labour Appeal Court held that a union party was not entitled to introduce two-tier bargaining by making wage demands at plant level in respect of a single employer. This was so even during the period when no collective agreement regulating wages and conditions of employment was operative — the constitution remained extant despite the expiry of the collective agreement (*Wallenius Wilhelmsen Logistics Vehicle Services v National Union of Metalworkers of SA & others* at 1254). However, where a bargaining council main agreement prohibited plant level bargaining on matters of mutual interest, and the employer, through its employers' organisation, refused to be party to the main agreement, the Labour Court found that the employer had forfeited centralised bargaining protection in terms of s 65(3)*(a)* of the LRA 1995, and the union was entitled to pursue plant level collective bargaining and was entitled to strike over a matter of mutual interest (*J & L Lining (Pty) Ltd v National Union of Metalworkers of SA & others (1)* at 1289).

Contract of Employment — Retention Bonus

The Labour Appeal Court has confirmed that the purpose of a retention bonus is to retain the employee's services for a specified period and that, by accepting the bonus, the employee gives up the freedom to leave employment without repaying the bonus (*Solidarity on behalf of Scholtz v Gijima Holdings (Pty) Ltd* at 1216).

Contract of Employment — Lawful and Fair Termination

The employee signed a contract of employment providing for her immediate removal from the site of a client if she failed a polygraph test. This had happened. The employer could find no alternative placement for her, and retrenched her. In unfair dismissal proceedings, the employer relied on the contract of employment to argue that the termination was lawful. The CCMA commissioner accepted that in principle an employer had the right to terminate a contract on repudiation thereof by an employee, but he pointed out that whether such termination was also fair in terms of the LRA 1995 was an entirely different question. In this matter the employee was not afforded a hearing before her dismissal and there was no evidence corroborating the polygraph test results. The commissioner found that the dismissal was therefore unfair (*National Transport Movement on behalf of Ramaboka and Fantique Trade 249 CC t/a Specialised Security Services* at 1360).

Temporary Employment Service

The Labour Court has confirmed that there are four requirements to determine whether a company is a temporary employment service within the meaning in s 198(1) of the LRA 1995, namely whether the company provides its client with 'other persons'; whether these persons 'perform work for' the client; whether these persons are remunerated by the company; and whether the 'other persons' are provided by the company 'for reward'. In this matter, the court found that the company, which had entered into a service level agreement with a client to repair pallets for a fixed fee per unit, was not a TES as defined, and its employees therefore fell outside the scope of the deeming provision in s 198A(3)*(b)* (*Chep SA (Pty) Ltd v Shardlow NO & others* at 1276).

Disciplinary Penalty — Sanction Short of Dismissal

Where the employee had participated in an unprotected strike, the employer imposed a sanction of a final written warning and further obliged him to sign a 'peace agreement' in terms of which he undertook to tender his services in terms of his contract of employment and binding collective agreements. A bargaining council arbitrator found that the sanction did not constitute an unfair labour practice. On review, the Labour Court found that the employee should have disassociated himself from the striking employees and communicated his decision that he wished to return to work to the employer. As he had failed to do so, the imposition of a final written warning and an obligation to sign the peace agreement was not unfair (*Association of Mineworkers & Construction Union & another v Metal & Engineering Industries Bargaining Council & others* at 1262).

Disciplinary Penalty — Misconduct during Strike

The employee, who participated in a legal strike and was aware of a plan to bomb the house of a non-striking co-worker, was dismissed for failure to inform the employer of the planned attack. A CCMA commissioner found that the employee's failure to inform the employer constituted serious misconduct and a breach of the picketing rules. As the employee had shown no remorse, his dismissal was fair (*Arnolds and Coca-Cola (Lakeside)* at 1353).

The employees, who during a protected strike had blockaded entry and exit points to the employer's premises, had been engaged in intimidation and had hijacked a bus, were dismissed. A CCMA commissioner found that the employer had presented credible evidence and video footage corroborating the testimony to prove the misconduct. The dismissal of the employees for misconduct and breach of the picketing rules was found to be fair (*National Union of Metalworkers of SA on behalf of Segopolo & others and Benleg Transport Services* at 1378).

Disciplinary Penalty — Long Service and Clean Record

In *National Transport Movement on behalf of Tlhako and Airports Company SA SOC Ltd* (at 1365) a CCMA commissioner found that, where the employee had admitted to being guilty of gross negligence in the performance of his duties, the fact that he had long service and a clean disciplinary record were not factors mitigating the serious misconduct, but were aggravating factors which justified the sanction of dismissal.

Suspension — Unfair Suspension

The MEC for Education in the North West Province summarily suspended the applicant educator following an incident with racial overtones at a primary school. In an urgent application, the Labour Court found that, as the educator was not employed in terms of the Employment of Educators Act 76 of 1998, the MEC had no authority to suspend her. In addition, the decision to suspend had been taken in flagrant disregard of the fundamental principle of audi alteram partem. The suspension was therefore unlawful and unfair, and the court ordered that it be set aside (*Solidarity on behalf of Barkhuizen v Laerskool Schweizer-Reneke & others* at 1320).

Public Service Employee — Transfer 'in the Public Interest'

The Labour Court, in *Walsh v Superintendent General: Eastern Cape Department of Health & others* (at 1328), considered when it would be 'in the public interest' to transfer an employee in terms of s 14(1) of the Public Service Act (Proc 103 of 1994). In this matter, although it was clearly demonstrated that there was a close link between the trade unions' relentless campaign to oust the applicant as CEO of the hospital, the court found that this behaviour constituted but one of the factors that motivated the superintendent general to transfer the applicant. He had considered the interests of a broad range of people encompassing the hospital's staff and its patients, and the hospital's proprietary interests, when coming to the decision that it was in the public interest to transfer the applicant.

Practice and Procedure

The Labour Appeal Court has found that an applicant must seek compliance with a court order by way of execution or contempt proceedings, and not by way of an application to compel (*City of Johannesburg & another v Independent Municipal & Allied Trade Union on behalf of Erasmus & another* at 1191).

The Labour Court, in *Carmichael-Brown v Liquid Telecommunications (Pty) Ltd* (at 1270), noted that there are two processes available to a party to obtain documents — the discover process which enables a litigant to discover documents in the possession of an opponent, and the subpoena process for securing production of documents from persons who are not necessarily parties in the main action.

In *J & L Lining (Pty) Ltd v National Union of Metalworkers of SA & others (2)* (at 1303) the Labour Court set out the considerations that guide the court when determining whether to grant leave to intervene. It found that, notwithstanding that rule 22 of the Labour Court Rules provides that an application to intervene can be brought 'at any stage of the proceedings', where the application was brought at the appeal stage after the matter had been heard and final judgment delivered, the application was brought too late, and it would not be in the interests of justice to grant leave to intervene.

Quote of the Month:

Van Niekerk J in *Walsh v Superintendent General: Eastern Cape Department of Health & others* (2019) 40 *ILJ* 1328 (LC), commenting on the capitulation by a provincial health department's officials to the unlawful demand by unions to remove the chief executive officer of a hospital:

'In these circumstances, when an employer allows itself to be held hostage to a concerted campaign of violence and intimidation conducted by power-hungry union officials, the basis for any semblance of a system of industrial relations is compromised. In the resultant anarchy, for those citizens who are reliant on the services provided by the department of health, life will literally and inevitably run the risk of being reduced to the Hobbesian description of life without state structures and controls — "solitary, poor, nasty, brutish and short". So it was for the hospital's patients, to whom the constitutional right of access to health care is owed, and who have suffered as a consequence of the conduct of the unions and their officials and members.'