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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Disciplinary Penalty — Interference in Penalty Handed Down by Disciplinary Chairperson

In several matters the courts have confirmed that the test whether an employer may interfere in a disciplinary sanction imposed by the chairperson of a disciplinary hearing is fairness and fairness alone:

The Labour Appeal Court, in *Anglo American Platinum (Rustenburg Platinum Mines) v Beyers & others* (at 2149), having reiterated that the test was whether fairness between employer and employee, informed by exceptional circumstances, justified interference with the sanction imposed by the disciplinary chairperson, found that the employer's change of sanction from a final written warning to dismissal was not fair, and upheld the Labour Court's decision.

The Labour Court, in *Moloantoa v Commission for Conciliation, Mediation & Arbitration & others* (at 2259), distinguished between cases in which the employer instituted a second hearing and those in which it merely changed the sanction imposed by the disciplinary chairperson. In this matter the employer had changed a penalty of suspension without pay to dismissal despite a provision in its disciplinary code obliging it to implement the decision of the chairperson. The court noted that it was bound by the decision of the LAC in *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* (2016) 37 *ILJ* 655 (LAC), and found that the substitution of the sanction in these circumstances was not merely procedurally unfair, but was substantively unfair and also invalid.

The High Court, in *Mntambo v Piotrans (Pty) Ltd* (at 2298), found that the employer had abrogated the procedure agreed to in the employee's contract when it unilaterally changed the disciplinary chairperson's acquittal of the employee to a sanction of dismissal. Although the employee claimed specific performance in the form of reinstatement, the court, in the exercise of its discretion, refused to order specific performance.

It was satisfied that, by becoming embroiled in litigation by disgruntled shareholders against the employer and deposing to an affidavit against the employer, the employee could not reasonably expect to command the level of trust and confidence required from senior managers.

Companies and Other Corporate Entities — Company in Liquidation — Abandonment of Proceedings

The Labour Appeal Court found that the deeming provision in s 359(2)*(a)* of the Companies Act 61 of 1973 is purely for the benefit of the liquidator of a company and he is at liberty to waive or to dispense with its compliance — the object of the section being to prevent the liquidator from being overwhelmed or inundated with legal proceedings without having sufficient time within which to consider properly whether the company in liquidation should resist or settle them. The court found further that the defence that the liquidator has to a claim in terms of s 359(2)*(a)*, namely that the claim is deemed abandoned, is not an absolute defence, because the court may direct in terms of s 359(2)*(b)* that notwithstanding non-compliance with subsection (2)*(a)*, the claim is not abandoned (*Groom v Daimler Fleet Management (Pty) Ltd* at 2179).

Temporary Employment Service — Deemed Employer

The Labour Appeal Court has confirmed that the deeming provision in s 198A(3)*(b)* of the LRA 1995 only applies when a tripartite relationship exists between the employees, the temporary employment service and the client. In this matter, the employees had failed to establish such a tripartite relationship and were therefore unsuccessful in claiming permanent employment with the municipality (*Ekurhuleni Metropolitan Municipality v Madonsela & others* at 2168).

Labour Court — Jurisdiction

The Labour Appeal Court found that it is a trite principle that the court having jurisdiction in the main action also has jurisdiction in any ancillary matter to the main claim. It found further that the jurisdiction of the Labour Court may be extended by the application of the principle of causa continentia — convenience and effectiveness being the key considerations (*Groom v Daimler Fleet Management (Pty) Ltd* at 2179).

Costs — Labour Court

The Labour Court declined to award costs to the trade union, AMCU, which had obtained a declaratory order against the Minister of Mineral Resources & Energy and the Chief Inspector of Mines in terms of which Covid-19 was declared to be an occupational disease as defined in the Mine Health and Safety Act 29 of 1996. On appeal by AMCU against the refusal to award it costs, the Labour Appeal Court confirmed that the Labour Court had a wide discretion to award costs which could only be interfered with where it acted capriciously or applied the law incorrectly. The court found that the guiding principle relating to costs orders was the effect of such an order on the ongoing relationship between stakeholders. In this matter, a high degree of cooperation was necessary between the unions, employers and the Department of Mineral Resources & Energy for the

implementation of the declaratory order, and a costs order could undermine that relationship. The LAC therefore dismissed the appeal (*Association of Mineworkers & Construction Union v Minister of Mineral Resources & Energy & others* at 2158).

Health and Safety — Mine Health and Safety Act 29 of 1996

Regulation 4.16(2) of the regulations in terms of the Mine Health and Safety Act 29 of 1996 requires written approval of the Chief Inspector of Mines for blasting operations to be conducted within 500 metres of dwellings. The chief inspector declined to grant the appellant coal mine such consent on the basis that it had not shown the absence of significant risk to the dwellings and their occupants. In an appeal in terms of s 58(1), the Labour Court confirmed that an appeal in terms of s 58(1) is an appeal in the strict sense, namely a rehearing of the merits limited to the evidence or information on which the decision under appeal was given. The court found, having considered the evidence, that the risk of injury to persons and damage to structures was not significant during blasting operations, but that the risk to persons after blasting remained significant in the event of post-blast damage to structures. The court accordingly found that the chief inspector had correctly declined to grant approval for blasting (*Kangra Coal (Pty) Ltd v Minister of Minerals & Energy & others* at 2234).

Health and Safety — Reckless Disregard for Covid-19 Protocols

The employee reported for work after he had tested for Covid-19 and while awaiting the results of his test. He was dismissed. In unfair dismissal proceedings before the NBCRFLI, the arbitrator found that, although the employer had no written rule or policy on Covid-19 protocols, the need to self-isolate was well established in society. Moreover, the employee had self- isolated previously while awaiting the outcome of a Covid-19 test, and was thus aware of the procedure. The arbitrator was satisfi d that the employee's act of reporting to work and exposing the workforce to risk constituted serious misconduct justifying dismissal (*Democratised Transport Logistics & Allied Workers Union on behalf of Jacobs and Quality Express* at 2334).

The employee was dismissed for breaching the employer's health and safety rules and endangering others by failing to wear a face mask in the workplace, having already been issued with a final written warning for the same offence. In unfair dismissal proceedings before the MEIBC, the arbitrator found that the employee had been trained on the Covid-19 protocols and was aware of the rule. His dismissal was therefore appropriate (*National Union of Metalworkers of SA on behalf of Manyika and Wenzane Consulting & Construction* at 2341).

Arbitration Awards — Review — Security

The Labour Court considered whether the stay of enforcement of an arbitration award in terms of s 145(3) of the LRA 1995 is conditional upon the furnishing of security in terms of s 145(7), and concluded that s 145(7) is not to be interpreted to mean that, if no security is furnished or no order granted absolving a party from furnishing security, the arbitration award cannot be stayed pending a review application (*Emalahleni Local Municipality v Phooko NO & others* at 2196).

Demarcation Awards — Civil Engineering Industry

The Labour Court dealt with two applications to review demarcation awards in terms of s 62 of the LRA 1995 relating to the civil engineering industry. Both matters centred on the definition in the collective agreement of the 'civil engineering industry' and the exclusion of the 'mining industry' from that definition:

In *Intasol Tailings (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 2204) the main activities of the employer were the operation of tailings dam facilities, hydro-mining and the provision of consultancy services relating to these operations. The court found that these operations were not work of a civil engineering character normally associated with the civil engineering sector, and that that arbitrator's demarcation award had to be reviewed and set aside.

In *National Union of Metalworkers of SA v Commission for Conciliation, Mediation & Arbitration & others* (at 2276) the employer was contracted to move bulk material from one point on a mine to designated stockpiles. The court found that the fact that civil engineering activities were carried out in a mine did not necessarily mean that those activities collapsed into the mining industry. In determining whether the activities of the employer fell within the mining industry and had been excluded from the scope of the civil engineering industry, it had to be determined whether the employer and its employees were 'associated for the purpose, directly or indirectly, for the winning, extracting, processing and refining of a material in, on or under the earth'. The employer and its employees were, on the facts, not associated for such purpose, and therefore clearly fell within the scope of the civil engineering bargaining council and not the mining sector.

Educator — Deemed Dismissal in terms of Section 14 of Employment of Educators Act 76 of 1998

The applicant educator had been discharged in terms of s 14(1) of the Employment of Educators Act 76 of 1998 following her alleged unauthorised absence from work. She made representations seeking reinstatement, which the head of department, acting in terms of s 14(2), refused on the ground that he was not convinced that the educator had shown good cause for her unauthorised absence. On review, the Labour Court confirmed that justice required that the far-reaching powers vested in the head of department by s 14 had to be exercised properly. It found further that, on the head of department's own evidence, it was clear that he had misunderstood what was required of him — he was required to determine whether the educator had shown good cause to have her reinstatement approved, not whether she had shown good cause for her unauthorised absence. The court accordingly set aside his decision and remitted the matter to the department for consideration de novo (*Jordan v Education Labour Relations Council & others* at 2227).

Public Service Employee — Transfer in terms of Section 12 of Public Service Act (Proc 103 of 1994)

The applicant, the head of a provincial department, alleged that she had been transferred from the provincial department to a national department. The Labour Court found that, in terms of ss 12 and 14 of the Public Service Act (Proc 103 of

1994), the transfer of a head of a provincial department to a national department had to be initiated by the president in consultation with the premier of the province. In this matter the president had not exercised his discretion to approve the transfer of the applicant, and there had, therefore, been no lawful transfer *Mbanjwa v Minister of the National Department of Public Works & others* at 2244).

Contract of Employment — Breach — Repudiation

The applicant claimed damages for the department's alleged repudiation of her contract of employment. The Labour Court noted that a party claiming repudiation had to prove the existence of a contract. It found that the applicant had failed to prove the existence of a contract of employment between her and the national department to which she alleged she had been transferred, and dismissed her claim (*Mbanjwa v Minister of the National Department of Public Works & others* at 2244).

Reinstatement — Employer Refusing to Reinstate Employee

The CCMA ordered that the employee be reinstated following its finding that his dismissal had been unfair. The employee tendered his services, but the employer refused to reinstate him. The employee was finally reinstated once the employer unsuccessfully applied for leave to appeal against the Labour Court's dismissal of its review application. The employee then approached the Labour Court in terms of s 77(3) of the Basic Conditions of Employment Act 75 of 1997 for an order declaring the employer liable for arrear renumeration and interest for the period between his tender of services and the date of his reinstatement. The court confirmed that the reinstatement order served to revive the contract of employment, and that the employee was entitled to backpay from the date of the award to date of reinstatement. It found that it was not necessary for the employee to quantify his contractual claim when seeking a declaratory order in terms of s 77(3) (*National Union of Mineworkers & another v Seriti Coal (Pty) Ltd t/a New Vaal Colliery* at 2291).

Dismissal — Breach of Social Media Policy — Covid-19

The employee, who had taken leave before the declaration of the national state of disaster, was stranded and could not secure transport to return to work. The employer required the employee to use his annual leave to cover his absence, and, frustrated by this decision, he resorted to Twitter and tweeted that the employer was 'forcing' employees to work. He was dismissed for breaching the employer's social media policy. In unfair dismissal proceedings in the CCMA, the commissioner found that, although the tweet clearly amounted to misconduct, there were circumstances which mitigated the sanction of dismissal. The decision to dismiss was found to be unfair, and the employee was reinstated on a final written warning (*Mabusela and Metropolitan Health* at 2307).

Dismissal — Insubordination — Covid-19

At the time of the declaration of the national state of disaster the employer children's home issued an instruction that, in order to protect the vulnerable

children in its care, care workers would not be permitted to leave the premises on off days. Although the employee care worker initially abided by the instruction, she later insisted on taking leave and proceeded to do so after being instructed not to. She was dismissed and referred an unfair dismissal dispute to the CCMA. The commissioner found that the employee had disobeyed a rule that was valid and reasonable, and that her dismissal was justified (*Mogano and St Mary's Children's Home* at 2318).

Dismissal — Bringing Employer into Disrepute — Covid-19

The employee administrator for a medical doctor in private practice advised the hospital at which he had rooms that the doctor was exhibiting Covid-19 symptoms. She was dismissed for bringing the doctor's name into disrepute and for breach of confidentiality. In unfair dismissal proceedings, the CCMA commissioner found that there was no evidence of actual or potential harm suffered by the doctor and that the doctor would have had to disclose his symptoms on arrival at work. Furthermore, the nature of the virus and the regulations was such that one had to disclose symptoms during the screening process in order to prevent transmission, and this was especially so in the medical profession. The employee had not breached any rule, and her dismissal was unfair (*Sliedrecht and Mathonsi* at 2327).

Quote of the Month:

Not awarded.