

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Jurisdiction — High Court, Labour Court and CCMA

The Supreme Court of Appeal has confirmed the parameters of the Labour Court's exclusive jurisdiction in terms of s 77(1) of the Basic Conditions of Employment Act 75 of 1997, holding that the provisions of s 77(1) do no more than confer a residual exclusive jurisdiction on the Labour Court to deal with those matters that the BCEA requires to be dealt with by that court. Generally, in instances where the dispute relates to, is linked to, or is connected with an employment contract, s 77(3) of the BCEA, which confers concurrent jurisdiction on the civil courts and the labour courts, applies (*Lewarne v Fochem International (Pty) Ltd* at 2473).

In *National Union of Metalworkers of SA & others v Natal Stainless Steel (Pty) Ltd* (at 2598) the Labour Court found that it had no jurisdiction to adjudicate an unfair dismissal dispute that had been abandoned and had not been referred to it, which the applicant union sought to resurrect by coupling it to a selective re-employment dispute.

Casual workers employed on an ad hoc basis by the employer referred a dispute to the CCMA in terms of s 198A of the LRA 1995 alleging unfair treatment and seeking the same working hours and pay as permanent employees. The CCMA commissioner found that s 198A afforded recourse to persons employed by a temporary employment service and not an employer, and that casual workers working on an ad hoc basis were not covered by s 198A. The CCMA accordingly did not have jurisdiction to determine their dispute (*African Meat Industry & Allied Trade Union on behalf of Madikane & others and Illovo Sugar SA (Pty) Ltd* at 2633).

The employee referred a dispute in terms of s 10 of the Employment Equity Act 55 of 1998 concerning alleged unfair discrimination to the CCMA. The commissioner found that the real nature of the dispute was alleged victimisation, and that the CCMA did not have jurisdiction to arbitrate the dispute (*Dlamini and eThekweni Health* at 2639).

In *Thaver and Pick 'n Pay Retailers (Pty) Ltd* (at 2655) the CCMA commissioner noted that rule 4 of the CCMA Rules permitted only a party or a person entitled in terms of the LRA 1995 or the CCMA Rules to represent that party to sign the referral form. The commissioner found that the employee's attorney was not a party and, in the absence of legal representation being considered and granted, he lacked capacity to sign the referral. The referral to arbitration was therefore fatally defective and the CCMA lacked jurisdiction to entertain the dispute.

Disciplinary Code and Procedure — Competent Verdicts

In *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 2477) the Labour Appeal Court confirmed that there is no requirement that competent verdicts on disciplinary charges should be mentioned in the charge-sheet, subject to the general principle that the employee should not be prejudiced. Prejudice normally will only arise where the employee has been denied knowledge of the case he has to meet. Prejudice is absent if the record shows that, had the employee been alerted to the possibility of a competent verdict on a disciplinary charge, he would not have conducted his defence any differently or would not have had any other defence.

Disciplinary Code and Procedure — Public Service — Review of Decision of Chairperson

In both *Democratic Nursing Organisation of SA on behalf of Ramaroane v Member of the Executive Council for Health, Gauteng Province & others* (at 2533) and *Statistics SA v Molebatsi & others* (at 2603) the Labour Court considered the court's review jurisdiction and powers under s 158(1)(h) of the LRA 1995. In *DENOSA* the court confirmed that it would only entertain a review in terms of s 158(1)(h) where no other remedy was available. It found that the provisions of s 158(1)(h) were not an open invitation to parties to review each and every act performed by the state as employer — if the cause of action met the definitional requirements of an unfair labour practice or an unfair dismissal, the dictates of constitutional and judicial policy mandated that the dispute had to be processed by the system established by the LRA for their resolution, and not by way of review under the provisions of s 158(1)(h). In *Stats SA* the court expressed its concern with the growing practice of public service employers which are dissatisfied with the decisions of their own disciplinary chairpersons of automatically approaching the court to review those decisions. It found that this constituted a misuse of the court process as a 'back-up plan' and that employers should rather ensure that the chairpersons presiding over hearings have the necessary competence to discharge their duties properly.

Disciplinary Code and Procedure — Intervention in Uncompleted Disciplinary Proceedings

In *Mkasi v Department of Health: KwaZulu-Natal & another* (at 2576) the Labour Court granted an interdict preventing the employer from continuing with a disciplinary enquiry pending an application to review certain preliminary rulings made by the disciplinary chairperson. The court was satisfied that if the review court found in the employee's favour, that had the potential to put a permanent end to the disciplinary hearing.

Dismissal — Breakdown of Trust Relationship

The Labour Appeal Court has found that, where it was established that the employee had wrongfully distributed valuable intellectual property belonging to a client of his employer, the employer had justifiable lost trust in the continuation of the employment relationship, and dismissal was therefore appropriate in the circumstances (*EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* at 2477).

In *Khambule & another v Impala Platinum Ltd & others* (at 2505) the Labour Appeal Court found that an employer cannot allege a breakdown in the employment relationship where there is insufficient proximity between the employee and supervisor involved nor can it allege a breakdown at the stage that guilt is established if the relationship was not broken at the time of commission of the misconduct.

Dismissal — Probationary Employee

The Labour Appeal Court has found that, where a probationary employee's performance was unsatisfactory and her performance reviews and evaluation carried on beyond the end of the probationary period, the reasonable inference was that the parties intended to extend the probationary period until the process was completed. Thus, the CCMA commissioner's finding that the fact that her employment had continued after the end of the probationary period indicated that she was a permanent employee and that her performance was satisfactory was irrational and had to be set aside (*Ubuntu Education Fund v Paulsen NO & others* at 2524).

Dismissal — Incapacity — Imprisonment

In *Molehe v Public Health & Social Development Sectoral Bargaining Council & others* (at 2584) the Labour Court confirmed that there is no inflexible rule of law that incapacity which is outside the control of an employee cannot be a cause for his or her dismissal. In this matter the court found on the facts that, where the employee had been convicted and imprisoned for bribery and corruption and had been unable to render services to his employer, his dismissal was fair and justifiable.

Reinstatement — Not Reasonably Practicable

The Labour Court has found that, despite the fact that the employee's dismissal was substantively unfair, reinstatement was not the appropriate remedy where his dismissal was unfair in terms of s 186(1)(b) of the LRA 1995 and the fixed-term contract on which he relied had expired some years before the dispute was arbitrated (*University of South Africa v Stapelberg NO & others* at 2610).

Settlement Agreement — Validity

The Labour Appeal Court has found that, where both the employer and the minority union representatives held the mistaken view that the threshold agreement between the employer and the majority unions precluded the conclusion of a collective agreement conferring organisational rights on the minority union, that error had influenced the conclusion of a settlement agreement. The court accordingly upheld the Labour Court's finding that the settlement agreement had been concluded on the basis of a common mistake and had to be set aside (*Murray & Roberts (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* at 2510).

Strike — Interdict against Strike Action

In *Imperial Cargo (Pty) Ltd v Democratised Transport Logistics & Allied Workers Union & others* (at 2499) the Labour Appeal Court found that an employer is entitled to an order prohibiting a strike over impermissible demands even where permissible demands are also in place. It found further that a demand to rearrange weekend timetables at the employer transport and logistics company did not merely concern a change of a work practice, but was a substantive demand affecting costs — a demand which had to be bargained at bargaining council level and not plant level.

Resignation — Effective Date

The Labour Court has confirmed that resignation is the unilateral termination of an employment contract by an employee and that an employer is not entitled to discipline an employee once the resignation has taken effect. However, an employee who resigns with immediate effect in circumstances where he is contractually obliged to serve a period of notice commits a breach of his employment contract, and in response the employer can elect to hold the employee to the contract and seek an order of specific performance requiring the employee to serve the period of notice, or else accept the employee's repudiation, cancel the contract and claim damages. What an employer cannot do is refuse to accept the employee's resignation (*Naidoo & another v Standard Bank of SA Ltd & another* at 2589).

Evidence — Hearsay Evidence

The Labour Appeal Court has reiterated that the safeguards and precautions that have been developed in the criminal courts regarding the admission of hearsay evidence in order to ensure a fair trial apply, appropriately adapted, to arbitration proceedings. The court pointed out that it is not unreasonable to expect commissioners to be familiar with hearsay evidence, to be able to recognise it, and to apply the provisions of s 3 of the Law of Evidence Amendment Act 45 of 1988. The provisions of s 138 of the LRA 1995, which give commissioners a discretion to conduct arbitrations in a manner they consider appropriate, do not imply that they can arbitrarily receive or exclude hearsay, or any other evidence (*Exxaro Coal (Pty) Ltd & another v Chipana & others* at 2485).

The Labour Court considered the admissibility and weight to be attached to the transcript of internal disciplinary hearings at subsequent CCMA and bargaining council arbitrations. The court noted that, where the hearsay evidence has been properly tested at the disciplinary enquiry by way of cross-examination, the transcript should be afforded greater intrinsic weight than 'simple hearsay' because it then constitutes a comprehensive and reliable record of a prior quasi-judicial encounter between the parties. The court went on to confirm that hearsay such as a transcript of a properly run internal hearing might carry enough weight to require an accused employee to rebut allegations contained in the hearsay as long as certain guidelines have been met (*Department of Home Affairs v General Public Service Sectoral Bargaining Council & others* at 2544).

Representation

In *Dlamini and eThekweni Health* (at 2639) the union objected to the human resources manager representing the employer as the manager had represented the employer in an earlier arbitration hearing and thus had more knowledge of the facts than the union representative. The CCMA commissioner found that the HR manager was entitled to represent the employer in terms of rule 25 of the CCMA Rules and that there was no legal requirement that representatives had to have the same degree of knowledge of a matter.

In *National Education Health & Allied Workers Union on behalf of Naidoo and Durban Chamber of Commerce* (at 2646) the CCMA commissioner refused the employee's application to be represented by an attorney. The commissioner found that the unavailability of or lack of interest on the part of the union official representing the employee did not justify legal representation, especially where the matter was not complex and the employer's representative was not legally trained.

In *Coetzee and Autohaus Centurion* (at 2658) the MIBCO arbitrator confirmed that prior to the promulgation of the Legal Practice Act 28 of 2014, an arbitrator had a discretion to determine whether or not to grant legal representation at the council. However, s 25 of the Legal Practice Act granted a right of appearance to any legal practitioner, 'subject to any other law'. The LRA 1995 had not been amended to address this right and the rules promulgated by the council were subordinate to Acts of parliament, and hence the arbitrator concluded that he lacked the discretion to restrict the employee's right to legal representation, regardless of the nature of the dispute to be arbitrated. He agreed with the employee that he was consequently entitled to legal representation as a matter of law.

Practice and Procedure

Where there had been a delay of over two years and three months in the prosecution of a review application by employees, the Labour Court found that the application had lapsed and been archived in compliance with clause 11.2.7 of the Labour Court Practice Manual. In circumstances where the employees had not applied for condonation, had not offered any explanation for the excessive delay and had not shown good cause, the application remained archived and the court granted the employer's rule 11 application to dismiss the review application (*Matsha & others v Public Health & Social Development Sectoral Bargaining Council & others* at 2565).

In *Mkasi v Department of Health: KwaZulu-Natal & another* (at 2576) the Labour Court found that there was no law enabling a disciplinary chairperson to grant absolution in a disciplinary hearing.

In *National Union of Metalworkers of SA & others v Natal Stainless Steel (Pty) Ltd* (at 2598) the Labour Court confirmed that a pretrial minute cannot expand the ambit of the dispute referred for adjudication or change the nature of the dispute.

In *Steyn and SA Police Service* (at 2661) the SSSBC arbitrator had, in an unfair promotion dispute, to determine whether the employee was entitled to discovery of documents pertaining to a shortlisting process despite the fact that he had not been shortlisted. The arbitrator noted that he had to determine whether the documents sought were relevant, and found that the employee was not entitled to documents relating to a process of which he was not part. The SAPS was accordingly not obliged to discover documents relating to the shortlisting.

Quote of the Month:

Tlhotlhamaje J in *Democratic Nursing Organisation of SA on behalf of Ramaroane v Member of the Executive Council for Health, Gauteng Province & others* (2019) 40 ILJ 2533 (LC):

'It is understandable that unions want to be seen to be acting in the interests of their members and fighting their cause. That is commendable. However, there is no cause to fight for in instances where an employee has acted in the most reprehensible and dishonest manner as is evident from the common cause facts of this case. What cause can possibly be worth fighting for when an employee was dismissed for dishonesty involving cheating in an examination? What message is DENOSA sending to its members and other employees by vigorously challenging such a dismissal on an urgent basis? If the message to DENOSA members is unashamedly that "we have your back", and that it is perfectly normal to cheat and to be dishonest, and that they will be defended to the bitter end, then clearly there is something inherently wrong and palpably twisted with that logic. In these circumstances, to the extent that DENOSA failed to see the illfated and ill-conceived nature of this application, the requirements of law and fairness dictate that it be mulcted with punitive costs.'