

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Administrative Law — Exercise of Public Power — Promulgation of Regulations

The Labour Appeal Court confirmed that the promulgation of regulations is an exercise of public power which cannot be conducted in an arbitrary or irrational fashion. In the matter before it the Minister of Higher Education & Training had re-promulgated regulation 4(4) of the Grant Regulations 2012 published in terms of the Skills Development Act 97 of 1998 after the Labour Court had set aside the regulation on the grounds that it was irrational and unreasonable. The court found that no clear justification was offered for the decision by the minister to re-promulgate, which flew in the face of a court order. For this reason, the only conclusion that the court could reach was that the decision to re-promulgate regulation 4(4) was irrational and lacking in any legal justification (*Business Unity SA v Minister of Higher Education & Training & others* at 137).

Contracts of Employment — Fixed-term Contracts

The Labour Appeal Court upheld a CCMA commissioner's finding that the provisions of subsections (3), (4) and (5) of s 198B of the LRA 1995 are not applicable to historical contracts. It found therefore that these subsections were not applicable to the fixed-term contracts entered into for periods longer than three months of employees employed as interpreters by the CCMA before s 198B came into operation on 1 January 2019 (*Commission for Conciliation, Mediation & Arbitration v Commission Staff Association & others* at 145).

SA Human Rights Commission — Equality Report — Status

The SA Human Rights Commission, in the exercise of its powers of recommendation in terms of s 13 of the SA Human Rights Commission Act 40 of 2013, issued an Equality Report in which it made certain recommendations, including one that the Employment Equity Act 55 of 1998 be amended in relation to the way it dealt with the subject of designated groups. The Labour Court, having analysed the status of a report issued by the SAHRC in terms of its s 13 powers of recommendation, dismissed an application by Solidarity to confirm the findings and recommendations of the SAHRC in the Equality Report. It found that, as the report was not binding on the government or any other party and that its recommendations were merely advisory in nature, the court had no power to confirm or enforce the recommendations in the report (*Solidarity v Minister of Labour & others* at 273).

Labour Court — Jurisdiction

The Labour Court noted in *Malinga & others v KwaZulu-Natal Provincial Department of Education & others* (at 228) that there is a common misconception, especially in relation to urgent applications, that the court has jurisdiction to entertain any dispute that concerns a workrelated grievance, or to deal with any allegations of unfair conduct by an employer. This is not the case. The Labour Court is a superior court that has authority, inherent powers and standing, equal to those of a division of the High Court, but only in relation to matters under its jurisdiction. The scope of the court's exclusive and concurrent jurisdiction is to be determined by reference to s 157 of the LRA 1995, and it is self-evident that s 157 does not confer jurisdiction on the court to make orders regarding all and any employer conduct that is alleged to be unfair.

Protest Action — Section 77 Notice

The Labour Court, in *Business Unity SA v Congress of SA Trade Unions & others* (at 174), found that a notice of intended protest action in terms of s 77(1)(d) of the LRA 1995 has to be issued within a reasonable period. In this matter, where the protest notice in terms of s 77(1)(d) had been issued more than 14 months after NEDLAC's certificate in terms of s 77(1)(c), the court found that the notice had not been issued within a reasonable time and interdicted the protest action.

Disciplinary Penalty — Dismissal — Unprotected Strike

In *SA Commercial Catering & Allied Workers Union on behalf of Ramontlhe & others v Sun City* (at 160) the Labour Appeal Court found that dismissal was the appropriate sanction for shop stewards who had deliberately ignored a court order prohibiting participation in an unprotected strike.

Dismissal — Racial Slur on Private Facebook Page

The employee posted a comment referring to the government as ‘monkeys’ and former President Zuma as ‘stupid’ on her private Facebook page while on annual leave. She was dismissed for making racist remarks. The CCMA found her dismissal to be unfair, inter alia, because the employee had made the comment while she was on leave, using her own computer and data. In review proceedings, the Labour Court found that the comment was a racial slur directed at black people in government and that it was offensive. It found further that the employer was entitled to discipline and dismiss the employee for making racist and derogatory comments on the basis that she had linked herself to her employer by stating her occupation on her Facebook page. The court was satisfied that the employer had established a connection between the misconduct and its business sufficient to bring the employer’s name into disrepute for tolerating racism. The court accordingly found that dismissal was appropriate (*Edcon Ltd v Cantamessa & others* at 195).

Dismissal — Right to Discipline for Acts Committed Outside Work

The Labour Court affirmed that an employer has the right to discipline an employee for acts committed outside of the work environment if it establishes a connection between the employee’s misconduct and its business and shows that it has affected the employment trust relationship (*Edcon Ltd v Cantamessa & others* at 195).

Dismissal — Obligation to Disclose

The respondent failed to disclose the facts surrounding his mutually agreed termination of employment with his previous employer when he applied for the senior position of general manager of the applicant company. When the company later discovered the circumstances surrounding the termination of the applicant’s employment, it dismissed him. A CCMA commissioner found his dismissal to be unfair. On review, the Labour Court noted that the nature and extent of the obligation to disclose facts during the recruitment process were defined by the court in *Galesitoe v Commission for Conciliation, Mediation & Arbitration & others* [2017] 7 BLLR 690 (LC), where the court found that it was not unreasonable to infer that a person applying for a senior position should realise that the nature of his or her relationship with a former employer is a material consideration for a prospective new employer and could affect his or her employment prospects. Relying on these principles established in *Galesitoe*, the court found that the employee ought to have disclosed the facts surrounding his termination and that his failure to do so rendered his dismissal fair (*Intercape Ferreira Mainliner (Pty) Ltd v McWade & others* at 208).

Dismissal — Alcohol — Zero-tolerance Safety Policy

The employee, a senior manager at the respondent mine, had breached the mine's zero-tolerance safety policy by entering the mine premises after testing positive for alcohol. He was dismissed, and a CCMA commissioner upheld his dismissal. On review, the Labour Court found that the arbitration award was unassailable — the employee's conduct presented a safety hazard and was in contravention of the mine's policy and the regulations in terms of the Mine Health and Safety Amendment Act 74 of 2008. The employee had not lived up to the standard of compliance expected of a senior manager, and his dismissal was therefore justified (*Mphaphuli v Ramotshela NO & others* at 242).

Dismissal — Assault on Manager

The employee, upset with the loss of income arising from the curtailment of overtime by management of the company, confronted and assaulted his manager. He was dismissed. In arbitration proceedings, the employee denied the assault, but the CCMA commissioner found his dismissal to be fair. On review, the Labour Court upheld the award, finding that the commissioner had correctly found that the most plausible conclusion to be drawn from the evidence was that the employee had indeed assaulted his manager. The award was therefore upheld (*National Union of Metalworkers of SA on behalf of Mathonsi v Scaw Metals (Pty) Ltd & others* at 254).

Dismissal — Possession of Stolen Goods

The employee, a police officer, was found guilty of being in possession of stolen goods, and was dismissed. His dismissal was upheld by a SSSBC arbitrator. On review, the Labour Court considered the elements of the offence of being in possession of stolen goods in terms of the common law and ss 36 and 37 of the General Law Amendment Act 62 of 1995, and found that the arbitrator's findings could not be faulted. It found further that the transgression was serious and, to make matters worse, the employee was a law enforcement officer and, as such, it was incumbent upon him to assist in eradicating the trade in stolen goods which would in turn reduce the primary crimes of robbery and theft. The court was satisfied that, in the circumstances, the sanction of dismissal was clearly justifiable (*Police & Prisons Civil Rights Union on behalf of Makhettle v Safety & Security Sectoral Bargaining Council & others* at 265).

Collective Bargaining — Duty to Bargain and Organisational Rights

The Labour Court affirmed that the structure of the LRA 1995 is one in which commissioners and judges have no role in determining whether one party should bargain collectively with another, the subject-matter of any collective bargaining, the level at which bargaining should be conducted, or the identity of any bargaining partner. In the matter before it the court found that, where the union already enjoyed all statutory organisational rights in respect of each department making up the employer, there was no tangible benefit to be achieved by the union by having the court uphold a definition of 'workplace' that incorporated all the departments in a single collective agreement (*Bidair Services (Pty) Ltd v Makgoba NO & others* at 169).

Collective Bargaining — Code of Good Practice: Collective Bargaining, Industrial Action and Picketing

On the return date of an interim interdict prohibiting municipal employees from participating in unprotected strike action, the union and employees contended, *inter alia*, that the confirmation of the rule nisi would have the effect of ‘subduing’ collective bargaining in the workplace. The court was of the view that the employees clearly had an impoverished conception of the institution of collective bargaining, one that extended to a right to resort to unlawful action in the form of damage to property in pursuit of a demand made of an employer. As the recently published Code of Good Practice: Collective Bargaining, Industrial Action and Picketing noted, good faith bargaining required that the parties should engage each other in a constructive manner and not act unreasonably. Negotiations should be conducted in a rational and peaceful manner in which disruptive and abusive behaviour is avoided. In this matter, the employees acted in breach of the code — they resorted to what amounted to disruptive behaviour and wanton damage to property only because the employer had not acceded to their demands. Insofar as the employees sought to rely on the right to strike to justify their conduct, the code recalled that the constitutional right to strike was not unlimited — it was subject to substantive and procedural limitations, all of which were designed to maintain the integrity of the process of collective bargaining and to protect the constitutional rights of others. The rights to bargain collectively and to strike did not extend to trashing an employer’s premises and public spaces (*Johannesburg Roads Agency (SOC) Ltd v SA Municipal Workers Union & others* at 222).

Basic Conditions of Employment Act 75 of 1997 — Compliance Orders

The Labour Court noted that the process for the enforcement of compliance orders in terms of the Basic Conditions of Employment Act 75 of 1997 had shifted from the Labour Court to the CCMA with effect from 1 January 2019, when s 77A was amended by the deletion of para (a) and s 73 was amended to empower the CCMA on application of the director-general to issue an arbitration award requiring an employer to comply with a compliance order. The court found, however, that the amendments did not affect applications pending before the court before 1 January 2019, and that the court retained jurisdiction to consider such applications (*DirectorGeneral: Department of Employment & Labour & another v Green Secure Group* at 189).

Suspension — Suspension Pending Disciplinary Proceedings

A municipal manager had been suspended pending an investigation into allegations of misconduct against her. She approached the Labour Court on an urgent basis for an order declaring her suspension unlawful on the ground that the allegations related to poor work performance and not misconduct and that suspension was accordingly inappropriate. The court found that it was the prerogative of the employer to select the process to be followed and not the employee’s. Furthermore, that it would be improper for the court to determine or classify the nature of the allegations against the municipal manager and prescribe the process to be followed. The application was dismissed with costs (*Mokoena v Merafong Municipality & others* at 234).

Employee — Whether Interpreter Employee or Independent Contractor

In *Mkhize and Office of the Chief Justice* (at 284) a CCMA commissioner had to determine whether an interpreter at the High Court was an employee or an independent contractor. The commissioner considered the well-established requirements for determining whether a person was an employee and especially the decision in *Beya & others v General Public Service Sectoral Bargaining Council & others* (2015) 36 ILJ 1553 (LC), and found that the applicant was not an employee.

Employee — Whether Induna Employee of Government Department

In *National Union of Civil & Allied Workers on behalf of Mhlongo and Department of Co-operative Governance & Traditional Affairs & another* (at 296) a CCMA commissioner had to determine whether an Induna, a traditional leader under the authority of an Inkosi in accordance with customary law, was an employee of the Department of Co-operative Governance & Traditional Affairs. The commissioner considered all the relevant statutory law, and found that the Induna was a public office-bearer and not an employee, and that there was no contractual or employment relationship between the Induna and COGTA.

Temporary Employment Service — Deemed Employee in terms of Section 198A(5)

The applicant union referred a dispute in terms of s 198A(5) of the LRA 1995 to the CCMA on behalf of many of its members. The employer challenged the jurisdiction of the CCMA on the ground that the employees were no longer employed by it. The commissioner noted that it was undisputed that the employees were no longer employed by the employer and had in fact been retrenched prior to the dispute being referred to the CCMA. The commissioner considered the wording of s 198A(5) and confirmed that in order to seek relief for alleged unfair treatment in terms thereof, the employee must be in the deemed employ of the employer in question. Given that it was common cause that they were not so employed, the CCMA clearly lacked jurisdiction to entertain their claim (*United Chemical Industries Mining Electrical State Health & Allied Workers Union on behalf of Dlamini & others and Snackworks, A Division of National Brands & another* at 309).

Bargaining Council — Arbitrator — Recusal

In *Liberated Metalworkers Union of SA on behalf of Radebe and Nadile Enterprises t/a Sasol Truck Stop* (at 315) the union had requested the removal of the arbitrator in a letter to the bargaining council, MIBCO, before the arbitration hearing. The arbitrator ruled that, in the absence of a formal application for recusal properly brought before the arbitrator herself, there was no basis to grant recusal.

In *SA Road Passenger Bargaining Council and Bonatla Bus Service* (at 320) the company had requested the removal of the arbitrator in correspondence to the bargaining council, SARPAC, before the hearing of enforcement proceedings. Despite the absence of a formal application, the arbitrator heard the application for recusal and applied the test whether a reasonable person had a reasonable apprehension of bias. She found that the company's representative had behaved in a contemptuous fashion during the proceedings and had launched a personal attack on the arbitrator. In the circumstances, she refused to grant recusal and directed the council to send her finding to the Labour Court for a decision on contempt.

Evidence — Confession

A municipal employee had identified two co-conspirators in fraudulent transactions in a confession to an investigator. When the co-conspirators were confronted by the investigator, they both resigned. After his dismissal and in arbitration proceedings, the employee disputed the confession and the arbitrator rejected the confession in the absence of corroboratory evidence of the confession. In review proceedings, the Labour Court found that the arbitrator had completely ignored the corroboratory evidence that the other persons involved in the fraudulent transactions could not have been identified without the employee providing that information. The court concluded that, had the arbitrator dealt with the inconvenient evidence that he ignored, he would have been compelled to conclude that the only reasonable inference to draw was that the employee was guilty as charged. The employee's fraudulent misconduct was very serious and justified his dismissal (*City of Tshwane Metropolitan Municipality v SA Local Government Bargaining Council & others* at 184).

Practice and Procedure

The Labour Court granted leave to appeal against its order permitting a strike over a demand for an in-principle agreement on pay progression. The court, however, declined to interdict the strike action pending that appeal. It found, applying the provisions of s 18 of the Superior Courts Act 10 of 2013, that the applicant was attempting to obtain on an interim basis that which it had failed to obtain on a final basis. The relief sought was not within the power of the court in the course of granting leave to appeal (*Johannesburg Metropolitan Bus Services SOC Ltd v Democratic Municipal & Allied Workers Union & others* at 217).

The Labour Court confirmed an interim interdict against unprotected strike action by municipal employees and, noting that the employees had participated in wanton acts of destruction of the employer's and public property and that the union had done nothing to prevent the trashing by its members, it found it appropriate that the union, and not the ratepayers, be burdened with the costs of the proceedings (*Johannesburg Roads Agency (SOC) Ltd v SA Municipal Workers Union & others* at 222). Similarly, in *Mokoena v Merafong Municipality & others* (at 234), the Labour Court ordered a municipal employee who had brought a meritless urgent application against the municipality, to pay the costs, noting that the taxpayers should not be burdened with such costs.

The employee erroneously referred an unfair dismissal dispute to the CCMA instead of the relevant bargaining council. The commissioner noted that the correct procedure was for the CCMA and not the commissioner to elect whether to refer the dispute to the council or to appoint a commissioner to determine the dispute. He therefore referred the matter to CCMA management for a ruling in terms of s 147(2) or (3) of the LRA 1995 (*Sibeko and Chavani Civils (Pty) Ltd* at 302).

Quote of the Month:

Not awarded.