

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Defamation — Disclosure of Suspension Letters

In *Gwe v De Lange & another* (at 341) the High Court considered the elements of the *actio injuriarum* and dismissed a claim for damages for defamation by a public service employee against the regional manager and the MEC for Health, Eastern Cape. The employee, a shop steward facing charges of misconduct relating to sexual harassment, contended, *inter alia*, that the disclosure by the manager and the MEC of his suspension letter to his union and his wife had been wrongful and had harmed his reputation. The court was satisfied that, as the employee was a shop steward, the Code of Good Practice: Dismissal and the LRA 1995 required disclosure to the union and, in the circumstances, the publication had been of a clearly circumscribed nature and, in any event, was protected by qualified privilege.

Protected Disclosures — Purpose of Legislation

The Labour Appeal Court, in *National Institute for the Humanities & Social Sciences v Lepphoto & another* (at 374), confirmed that, while the Protected Disclosures Act 26 of 2000 is an important piece of legislation and is part of an overall framework ensuring that the exercise of both public and private power should be conducted in a transparent and accountable way, it was not enacted to encourage employees to exploit it in an attempt to fend off the inevitable consequences of their own actions or performance.

Sexual Harassment

In *Old Mutual Life Assurance SA (Pty) Ltd v Makanda & others* (at 444) the Labour Court considered the correct approach to be adopted by CCMA commissioners faced with mutually destructive versions by single witnesses in sexual harassment disputes. The court found that the correct approach, which was well established, was that a commissioner had to assess both versions against three factors — credibility, reliability and the probabilities. This was particularly so in cases involving sexual harassment where

the misconduct often took place in isolated circumstances. The court found further that the CCMA had to be a safe, gender-responsive dispute-resolution forum where the commissioner had to be alive to the fraught nature of sexual harassment, had to conduct the arbitration with the requisite degree of sensitivity, and had to shed patriarchal predispositions in the assessment of the evidence.

Similar sentiments were expressed by a CCMA commissioner in *Nkabinde and Avenge Trident Steel (Pty) Ltd* (at 507). In this matter the commissioner also considered the impact of the ‘#MeToo’ movement, and found that the case before him had many of the hallmarks of sexual harassment as described by advocates of the movement, namely, that it involved a powerful male predator in a position of authority; vulnerable, subordinate victims; unwelcome sexual advances, mostly in private; emotions of shock and shame which prevented victims from sharing their experiences; the victims were ignorant of the law and their rights relating to sexual harassment; they feared that they would not be believed if they reported the matter; lack of empathy on the part of the powers that be; collective action by the victims; protracted and cumbersome disciplinary and legal proceedings; a lack of corroborating evidence; and a flat denial by the alleged abuser.

Collective Agreements

Following extensive consultations between the National Lotteries Commission and the recognised union, NUPSAW, the parties had signed a relocation agreement relating to several employees who were to be transferred from Gauteng to other provinces. The employee, a member of NUPSAW, challenged her relocation to KwaZulu-Natal on review in terms of s 158(1)(h) of the LRA 1995. The Labour Court found that there had been an unlawful delegation by the Commissioner of the NLC of her power on appeal to deviate from the original decision to relocate the employee and that consequently the decision of the manager to whom authority had been delegated was ultra vires. On appeal, the Labour Appeal Court found, inter alia, that the Commissioner of the NLC clearly had the statutory power to delegate her authority to the manager. It found further that the relocation agreement constituted a collective agreement which was binding on the employee in terms of s 23(1)(b) of the LRA, and it was inconceivable that a collective agreement to which a person was bound as a party could constitute a decision capable of review. The appeal by the NLC was accordingly upheld (*Mampane NO & others v National Union of Public Service & Allied Workers & another* at 363).

In *Solidarity on behalf of Members Employed in the Motor Industry v Automobile Manufacturers Employers’ Organisation & others* (at 419) the Labour Appeal Court found that the operative period of a collective agreement is a matter for the parties to the agreement — its applicability from a date earlier than its conclusion is therefore possible.

Agency Shop Agreement

In *Solidarity on behalf of Members Employed in the Motor Industry v Automobile Manufacturers Employers’ Organisation & others* (at 419) the Labour Appeal Court found that, although rectification of an invalid agency shop agreement is not possible, in this matter there had not been rectification — the subsequent agreement had repealed the invalid agreement and substituted it retrospectively with a new agreement which fully complied with the legislative requirements.

Strike — Strike Ballot

The Labour Court has confirmed that the transitional provision in s 19 of the Labour Relations Amendment Act 8 of 2018 is not an infringement of the right to strike and that union members are not entitled to strike until the provisions of s 95(5)(p) are complied with or a secret ballot is conducted. In this matter the failure to comply with the requirement of a secret ballot rendered the strike unprotected and it was interdicted (*Air Chefs (SOC) Ltd v National Union of Metalworkers of SA & others* at 428).

Labour Court — Jurisdiction

Three branches of a trade union, the PSA, contested the outcome of an election to fill vacancies on the PSA board and approached the Labour Court seeking an urgent order interdicting the PSA from filling the vacancies pending review of the outcome of the election. The court found that, terms of s 158(1)(e) of the LRA 1995, it was empowered to determine a dispute between a registered trade union and any one of its members about any non-compliance with its constitution. However, the three nominal applicants in this matter, the chairpersons of the three disenchanted branches, made it clear in their papers that they were not acting in their personal capacities, but as representatives of those branches. In the circumstances, the matter did not fall within the ambit of s 158(1)(e) and the court found that it did not have jurisdiction to hear the matter (*Pule on behalf of Public Servants Association of SA, Department of Home Affairs Branch & others v Public Servants Association of SA & others* at 488).

CCMA — Jurisdiction

In *SA Broadcasting Corporation SOC Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 493) the Labour Court confirmed that the CCMA had jurisdiction over termination of employment by an employer where the employer chose to classify the employee's alleged misconduct as a repudiation of contract — the termination constituted a 'dismissal' in terms of the LRA 1995 even if the employee classified the termination in contractual terms.

Residual Unfair Labour Practice — Grading Dispute

The Labour Appeal Court found that, on the evidence, it was clear that the employees in this matter were unfairly denied the benefit of being allocated a grade commensurate with the work they actually did. The court accordingly found that the CCMA commissioner's decision that the employer, Eskom, had committed an unfair labour practice was rationally based on the evidence. It upheld the appeal against the Labour Court decision, and confirmed that the commissioner's determination of the dispute by ordering the employees to be promoted or for their positions to be upgraded was reasonable (*National Union of Mineworkers on behalf of Coetzee & others v Eskom Holdings SOC Ltd* at 391).

Disciplinary Code and Procedure — Charges — Competent Verdicts

The Labour Appeal Court has confirmed that there is no requirement in disciplinary proceedings for competent verdicts to be mentioned in the charge-sheet and, in the absence of prejudice, an employee may be found guilty of an offence that is a competent verdict. The court approved the principle that, provided a workplace standard, which the employee knew, or reasonably should have known, had been contravened, and no significant prejudice flowed from the incorrect characterisation, an appropriate disciplinary sanction could be imposed. In the matter before the court the employee, an off-duty police officer, had shot and killed a civilian with his service firearm. He was charged with contravention of the SAPS Discipline Regulations by committing a common-law offence, 'to wit, murder', and dismissed. The court found, contrary to the finding of the SSSBC arbitrator, that it was not necessary to mention the competent verdict of culpable homicide in the charge-sheet. Regarding sanction, the court was satisfied that, because of the egregious nature of the misconduct and the circumstances of its commission, the sanction of dismissal was appropriate (*SA Police Service v Magwaxaza & others* at 408).

Retrenchment — Notice in terms of Section 189(3)

The Labour Court has found that the issuing of a s 189(3) notice is peremptory and that an employer's failure to issue a notice, even if it substantially follows a consensus-seeking consultation process, renders the process unfair. It noted that the s 189(3) notice is a significant statutory trigger for the basis for computation of the time periods established by s 189A of the LRA 1995 for intervention of the facilitator, the giving of notice of termination of employment, the issuing of a strike notice and the date by which a dispute must be referred to court (*SA Society of Bank Officials on behalf of Fourie v Nedbank Ltd* at 500).

Trade Union — Legal Standing

Three branches of a trade union, the PSA, contested the outcome of an election to fill vacancies of the PSA board and approached the Labour Court seeking an urgent order interdicting the PSA from filling the vacancies pending review of the outcome of the election. The court found that the PSA's 'statute', its memorandum of incorporation, established it as a legal persona and a body corporate with perpetual succession capable of suing and being sued in its own name. However, there was nothing in the statute to suggest that any branch established by its board enjoyed the same status, or had the same legal capacity (*Pule on behalf of Public Servants Association of SA, Department of Home Affairs Branch & others v Public Servants Association of SA & others* at 488).

Practice and Procedure

Where the applicant for review had filed a transcribed record made from its own recording of arbitration proceedings, the Labour Court detailed the multiple purposes of the Rules of the Labour Court and the Practice Manual and, in particular, the purposes of rule 7A of the rules relating to the provision of a record, and found that the provisions of rule 7A had not been followed (*Osho Steel (Pty) Ltd v Ngobeni NO & others* at 476). Where the applicant for review had failed to furnish security as required in s 145(8) of the LRA 1995, the Labour Court observed that the practice of filing a notice of motion encompassing prayers to review and set aside an award, a stay of execution, and exemption from furnishing security, is clearly at odds with the purpose of s 145(7). A reviewing party seeking to be exempted from payment of security needs to bring a proper application in that regard, and for the court to make a determination before it can be said that the review application is properly before the court and ripe for hearing (*Osho Steel (Pty) Ltd v Ngobeni NO & others* at 476).

Quote of the Month:

Sibanda AJ in *Old Mutual Life Assurance SA (Pty) Ltd v Makanda & others* (2020) 41 ILJ 444 (LC):

‘[T]he Commission for Conciliation, Mediation & Arbitration (CCMA) should be a safe, gender-responsive dispute-resolution forum. This principle is implicit in existing domestic legislation. Apart from this, the International Labour Organisation recently recognised this principle in the Convention Concerning the Elimination of Workplace Violence and Harassment in the World of Work. ... This injunction places several duties on commissioners. Primarily, it requires commissioners (and litigating parties) to be alive to the fraught nature of sexual harassment, and to conduct arbitrations with the requisite degree of sensitivity. More importantly, it requires commissioners to shed patriarchal predispositions in their assessment of the evidence. Failure to do so, leads to outcomes that are simply out of step with society’s fight against gender inequality.’