

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Labour Court — Jurisdiction — BCEA 1997 and LRA 1995

The Constitutional Court has, in *Amalungelo Workers Union & others v Philip Morris SA (Pty) Ltd & another* (at 863), held that, barring claims based on contract, the Labour Court has exclusive jurisdiction to entertain all claims under the Basic Conditions of Employment Act 75 of 1997. Its jurisdiction is not deferred until matters are resolved by labour inspectors.

In *Blinkwater Mills (Pty) Ltd & another v Food & Allied Workers Union & others* (at 873) the High Court found that s 68(1)(b) of the LRA 1995 does not give the Labour Court jurisdiction to order payment of just and equitable compensation for any loss attributable to a protected strike nor does it empower the Labour Court to entertain delictual actions.

The Labour Appeal Court has confirmed that the Labour Court has jurisdiction in terms of s 77 of the BCEA 1997 to hear any matter related to a breach of an employment contract. However, it expressed concern with the risks associated with dismissed employees coming to the Labour Court in terms of the BCEA and claiming breach of contract, seeking either specific performance or damages (*Toyota SA Motors (Pty) Ltd v Nzuza & others* at 980).

In *Democratic Municipal & Allied Workers Union of SA & others v City of Johannesburg* (at 912) the Labour Court found that it had no jurisdiction to make a determination as to the unlawfulness of a suspension.

In *Du Plessis v Public Protector & others* (at 919) the Labour Court found that it had no jurisdiction to review a decision by the Public Protector not to investigate the employee's complaint relating to a CCMA commissioner. The decision of the Public Protector was not a decision arising from the LRA 1995 nor from employment or labour relations.

In *Raseroka v SA Airways (SOC) Ltd* (at 978) the Labour Court confirmed that it had jurisdiction in terms of s 77 of the BCEA 1997 to hear any matter related to a breach of an employment contract. It found, however, that the onus rested on the employee to prove the existence of the contract term relied on. In this matter the employee had failed to show that her contract incorporated a right to a hearing, and this right could not be inferred in the contract. Her claim was therefore dismissed. In a similar matter, *Wereley v Productivity SA & another* (at 997), the court found that the disciplinary code which provided for a hearing was specifically included in the employee's contract and that consequently the premature termination of her contract in breach of her contract rendered her dismissal unlawful.

Dismissal — Compensation

The Labour Appeal Court has found that the function of ss 193 and 194 is not to yield a quantum based on the concept of positive interest (ie the value to the aggrieved party had the contract not been breached), but rather is premised on the broader consideration of fairness, having weighed the circumstances holistically. The court found further that, where the employee had not voluntarily resigned, that resignation was irrelevant to the computation of compensation (*Bester v Small Enterprise Finance Agency SOC Ltd & others* at 877).

Dismissal — Duty to Disclose Conflict of Interest

In *De Beers Consolidated Mines Ltd (Venetia Mine) v National Union of Mineworkers & others* (at 884) the Labour Appeal Court found, contrary to the findings of both the CCMA and the Labour Court, that the employee's failure to disclose her personal involvement with employees of a subcontractor amounted to misconduct. It found further that the fact that the working relationship between employer and employee could be restored did not mean that dismissal was not the appropriate sanction. It found, however, that in this matter dismissal was not appropriate and that the employee's misconduct had to be penalised with reinstatement with limited retrospectivity.

Dismissal — Desertion

A suspended employee was dismissed on the grounds of desertion when he failed to respond to correspondence from his employer. In CCMA arbitration proceedings the commissioner found that there was no proof that any correspondence had been served on the employee and that it was specious for the employer to claim that it was unaware of the employee's whereabouts when it had send an employee to his home to verify his address. The commissioner found that desertion had not been proved and that the dismissal was unfair (*Jonkers and SA Breweries (Pty) Ltd* at 1020).

An employee security guard was found guilty of desertion for leaving his post two hours early. In CCMA arbitration proceedings the commissioner found that the employee was guilty of the misconduct. However, taking into consideration his 21 years of unblemished service and the fact that there was no evidence that the trust relationship had irretrievably broken down, dismissal was not appropriate. He found that progressive discipline was adequate to address the employee's attitude and efficiency, and ordered his reinstatement (*Maphutha and Bidvest Protea Coin (Pty) Ltd* at 1025).

Suspension

Where a municipal manager had been placed on suspension pending disciplinary proceedings, the Labour Appeal Court found that his suspension was unfair because no allegations had been levelled against the manager at the time of his suspension. It once again noted that various factors had to be taken into account by an arbitrator when exercising his or her discretion to award compensation and the quantum thereof (*Edumbe Municipality v Putini & others* at 891).

Disciplinary Code and Procedure — Interdict against Institution of Disciplinary Action

In an urgent application for an order restraining the employer from instituting any disciplinary proceedings against the employee pending finalisation of her application to review and set aside a settlement agreement, the Labour Court found that the application was premature as the employer had not yet contemplated disciplinary action against the employee. The court found further that it was reluctant to interfere with the employer's prerogative to discipline employees (*Mxakato-Diseko v Director General: Department of International Relations & Cooperation & others* at 953).

Settlement Agreement — Order of Court

In *Independent Municipal & Allied Trade Union on behalf of Nathan v Polokwane Local Municipality* (at 937) the Labour Court confirmed that for a settlement agreement to be made an order of court in terms of s 158(1)(c) of the LRA 1995 it must comply with the common-law requirements for a valid agreement and the statutory requirements set out in s 158(1A).

Contract of Employment — Fixed-term Contract — Section 198B of LRA 1995

Where the unions and the employer had agreed that the employer's fixed-term contract employees be deemed to be employed on a permanent basis in terms of s 198B(5) of the LRA 1995, the Labour Court found that, if those employees then wished to claim different treatment from their permanent colleagues, they had to lodge an unfair labour practice dispute and could not rely on s 198B. It found further that, as the agreement entered into between the parties included a procedure to determine disputes about its interpretation and application, the CCMA had no jurisdiction. It therefore found that the commissioner had committed a gross irregularity by treating the interpretation agreement as an unfair labour practice dispute, and set aside his award (*Passenger Rail Agency of SA v Commission for Conciliation, Mediation & Arbitration & others* at 961).

In *Bangela & another and Endulini Fruit* (at 1015) two employees who had signed written fixed-term contracts referred a dispute in terms of s 198B of the LRA 1995 to the CCMA. The commissioner found that the evidence was clear that the employees had signed fixed-term contracts for the duration of the picking season, that their contracts had expired, and that they had no expectation of renewal. The commissioner accordingly found that there was no dismissal.

In *Ntsoko and St John The Baptist Catholic School* (at 1036) the last contract of employment of an educator, employed on a series of fixed-term contracts, was not renewed. Having regard to the provisions of s 198B of the LRA 1995, the CCMA commissioner found that the work performed by the educator was not of a defined or limited duration and that the employer had not shown any justifiable reason to fix the term of his contract. The commissioner found, therefore, that the employee had been permanently employed and that the termination of his contract constituted a dismissal.

In *National Union of Metalworkers of SA on behalf of Nomanyama & another and Grupo Antolin (Pty) Ltd* (at 1041) the two employees had been employed on a fixed-term basis to replace employees on maternity leave. No written contracts were signed by the parties. The bargaining council arbitrator found that the wording of s 198B of the LRA 1995 was clear and unambiguous — it was a peremptory requirement that fixed-term contracts had to be in writing and had to stipulate the reason for fixing the term. The arbitrator therefore found that, in the absence of written fixed-term contracts, the employees were indefinitely employed and their dismissal had been unfair.

Quote of the Month:

Waglay JP in *Toyota SA Motors (Pty) Ltd v Nzuzo & another* (2020) 41 ILJ 908 (LAC):

‘[I]t appears to have become fashionable for dismissed employees to come to the Labour Court in terms of the BCEA and claim breach of contract seeking either specific performance or damages. I do not know the reason that has given rise to this, but the risk associated with claims made in terms of the BCEA, as in this matter before this court, is enormous. Firstly, unlike in the LRA the claimant must prove an unlawful breach and not unfairness for the termination of the employment; next in terms of the LRA reinstatement is generally compulsory where a dismissal is found to be substantively unfair, specific performance consequent upon a breach is not, and generally it is a discretionary relief. Furthermore, in terms of the LRA an employee whose dismissal is found to be unfair will receive compensation. In an action in terms of s 77, if the employee is able to prove a breach by the employer the only amount s/he will receive is the loss s/he has proved to have suffered as damages. Here s/he must also show that s/he has tried to mitigate the damages etc There is no way s/he can receive damages equal to the amount they would have earned from the date of the breach to the date that they would eventually have retired! This absurd prayer which is so regular seems to take leave of the basic rule that one is awarded damages that are proved not what you would have been paid had you remained in your employ till retirement.’