

# HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

## Demarcation — Demarcation Dispute and Award

The Labour Appeal Court has found that a demarcation dispute in terms of s 62 of the LRA 1995 is it a *sui generis* species of dispute requiring an understanding of policy choices leading to the allocation of activities to particular sectors — it is a broad investigative process rather than the usual adversarial contest of arbitration, which seeks the best fit in the light of the particular facts of the matter. In this matter the court upheld the Labour Court's review and setting aside of a demarcation award by a CCMA commissioner, and the court's finding that certain manufacturers of motor vehicle parts fell within the scope of MIBCO and not the MEIBC. It found that, while there was, in principle, no reason why an emphasis on the end product produced might be preferable to one focusing on the work process involved, and while either might be preferable in given circumstances, in this matter the two industries were distinguished in their conception by what they produced. Emphasis on the end product was therefore appropriate (*National Union of Metalworkers of SA v Commission for Conciliation, Mediation & Arbitration & others* at 1629).

## Covid-19 — Occupational Health and Public Health Issue

The Labour Court has found, in *Association of Mineworkers & Construction Union v Minister of Mineral Resources & Energy & others* (at 1705), that the Covid-19 pandemic is both an occupational health and a public health issue, and that the provisions of s 9 of the Mine Health and Safety Act 29 of 1996 are applicable to the Covid-19 response. The court consequently set aside the Inspector of Mines decision not to require employers to prepare a code of practice on the Covid-19 viral pandemic in terms of s 9(2) of the MHSA and his decision not to enact guidelines in terms of s 9(3) as being unreasonable.

## Covid-19 — Provision of Personal Protective Equipment

In *National Education Health & Allied Workers Union on behalf of Members Providing Essential Health Services v Minister of Health & others* (at 1724), the Labour Court dismissed an urgent application by the union for an order compelling the Minister of Health and the provincial MECs of Health to provide personal protective equipment to health workers. It found that the union had failed to establish a shortage of PPE at public health facilities warranting the relief sought and also awarded costs against the union. In the same matter the court considered the relief sought by the union against the Minister of Labour to exercise his powers in terms of the Occupational Health and Safety Act 85 of 1993. The court found that it was clear from a reading of the provisions of the OHS Act that the powers of the minister could only be exercised in circumstances where the minister was advised of hazards which threaten the health and safety of employees, through complaints which would have been registered with inspectors designated by the minister in terms of s 28 of the OHS Act and once all interested and affected parties had been afforded an opportunity to make representations in writing. The minister had received no such complaints, and the application was dismissed.

## CCMA — Jurisdiction — Extra-territorial Jurisdiction

The company established a branch operation in Mozambique and employed the employee as general manager of the Mozambican operation. The Labour Court had found that, as one of the employee's contracts provided that the employment law of Mozambique applied, that law was applicable when the employee was dismissed and that the CCMA had had no jurisdiction to arbitrate the employee's dismissal dispute. On appeal, the Labour Appeal Court found that the correct approach involved substance over form; the employer's Mozambican operation could not be seen as separate from its undertaking in South Africa. The location of the workplace of the employee was not the same as the place where the employer carried on the undertaking. Where the foreign office did not possess a separate legal personality and was not treated as a discrete undertaking but was, in substance, part of the South African undertaking, a person working in the foreign office had to be considered an employee of the South African undertaking. The court cautioned that, in the context of fissured workplaces, which have become common in a global economy, care had to be taken to examine the substance of the working relationship, because reliance on the form of the relationship could erode the protective objectives of legislation such as the LRA 1995 (*Robineau v Schenker SA (Pty) Ltd & others* at 1648).

## Restraint of Trade Agreements — Enforcement

In *Truworths Ltd v De Bryun & another* (at 1617) the High Court confirmed that, when determining the reasonableness of a restraint of trade agreement, the likelihood of affording a competitor an unfair competitive advantage by having access to a former employer's confidential information depended on the circumstances of the matter before the court. In this matter the court was satisfied that the former employer's protectable interest was not threatened and the employer's interest in being protected did not weigh sufficiently, qualitatively and quantitatively, against the employee's interest not to be economically inactive or unproductive, and consequently that it was unreasonable to enforce the restraint. Similarly, in *North Safety Products v Naidoo & another* (at 1736) the Labour Court distinguished between trade secrets and general recollected knowledge, and found that an employee's knowledge of products preferred by customers was not automatically protected information — the employer had no protectable interest in recollected knowledge, insights and experience garnered by the employee and his acumen or mastery of his trade honed over

years, even if that acumen was acquired and honed while employed by the employer. In *A J Charnaud & Co (Pty) Ltd v Van der Merwe & others* (at 1661) the Labour Court interpreted restraint of trade agreements signed by the employees, and found that they did not prohibit the employees from being employed by a competitor and from soliciting business from the customers of their former employer. It found further that, although the restraints prohibited the employees from disclosing confidential information, none of the employees possessed that type of information. The former employer had failed to prove a breach of the restraint agreements, and it was therefore not necessary for the court to consider whether enforcement of the agreements was reasonable.

In *Alcon Laboratories SA (Pty) Ltd v Potgieter & others* (at 1689) several employees had left the employer with the purpose of joining a new business in competition with the employer. The Labour Court found that it was not reasonable to individualise the confidential information and customer connections of each employee where they would work as a team in the new business sharing their knowledge and trade connections. It found further that, where the restraint of trade agreements provided for an extension of the restraint for the period of the breach, it was not unreasonable to enforce the restraints for the extended period where the extension was caused by the breach by the employees — this was not a punitive measure, but was designed to sterilise the employees for the full period that the parties had originally intended.

In *Plumblink SA (Pty) Ltd v Legodi & another* (at 1743) the Labour Court found that a senior sales representative who possessed information having commercial value relating to customer purchasing, pricing and discount structures and who had developed strong relationships with customers, was clearly in a position to exploit these trade secrets and customer connections when he joined a competitor of his former employer. The former employer had a protectable interest worthy of protection. The court supported the employer's rejection of an undertaking by the employee not to entice customers or divulge information, finding that the purpose of a restraint agreement was to relieve the employer from having to rely on the bona fides of the employee and to relieve it of its obligation to police undertakings given by the employee. In *Waco Africa (Pty) Ltd t/a Form-Scaff v Sack & others* (at 1771) the Labour Court also found that an employer cannot be expected to accept a former employee's undertaking. In this matter the court found that, where the employee was a senior sales manager who coordinated projects with customers, was involved in tenders, quotations, pricing and sales strategies and had extensive knowledge of the employer's customers, the employer clearly had a protectable interest worthy of protection.

In two matters dealing with restraints, the employees relied on novation of their restraint of trade agreements. In both matters the Labour Court considered the principles applicable to novation, and found that the employees had failed to discharge the onus of proving an intention by the parties to novate the agreements (*Alcon Laboratories SA (Pty) Ltd v Potgieter & others* at 1689 and *Waco Africa (Pty) Ltd t/a Form-Scaff v Sack & others* at 1771).

## Restraint of Trade Agreements — Costs

In *Alcon Laboratories SA (Pty) Ltd v Potgieter & others* (at 1689) the employer sought an interdict to enforce restraint of trade agreements where the employees acted unlawfully as a team in setting up a business to compete with the employer. The Labour Court granted the interdict and, regarding costs, found that as the matter had the trappings of a commercial dispute, there was no reason in law and fairness why the employees should not pay the employer's costs.

In *Service Parts Logistics (Pty) Ltd v Mshengu* (at 1762) the employer had been forced to approach the court urgently to enforce a restraint agreement after the employee had refused to negotiate a consent agreement. At the hearing the employee agreed to an order in identical terms to those in the consent agreement prepared before litigation. The Labour Court found that the employer was substantially successful and was entitled to its costs — there was no reason not to follow the general rule in circumstances where the application was not brought in terms of the LRA 1995 but on a contractual basis where the requirements of fairness were not applicable in deciding the issue of costs.

## Unfair Discrimination — Employment Policy or Practice

The applicant, who had formerly been employed and dismissed by Metrorail, referred a claim in terms of s 6 of the Employment Equity Act 55 of 1998 to the CCMA contending that the failure by PRASA to appoint him constituted unfair discrimination. The CCMA commissioner noted that s 6 provided relief to 'employees' in relation to discriminatory employment practices and policies. She found that the applicant had never been successful in his application for employment with PRASA, was not an employee and therefore lacked locus standi to refer a dispute to the CCMA (*Dube and Passenger Rail Agency of SA Cres KZN* at 1783).

## Dismissal — Insubordination

The applicant, a managerial employee, had walked out of a meeting with his superior despite instructions not to do so, and had been dismissed for gross insubordination. In unfair dismissal proceedings before the CCMA, the commissioner noted that for conduct to constitute gross insubordination, the insubordination must be serious, persistent and deliberate; that a single incident may amount to gross insubordination; and that the employer must lead evidence proving that the employee is guilty of defying an instruction (*Netshitomboni and National Consumer Commission* at 1791).

## Evidence — Videoconferencing

The parties were engaged in a s 188A enquiry by a bargaining council arbitrator when a lockdown was implemented following the President's declaration of the coronavirus pandemic as a national disaster. Although the employer, which was an essential service and permitted to continue operations during the lockdown, sought to proceed with the enquiry by videoconferencing facilities, the employee objected thereto and sought that the matter be postponed until a traditional hearing could be conducted. The arbitrator noted that the LRA 1995 promotes expeditious dispute resolution, that postponements are not readily granted, and that parties pursuing rights under the LRA should not allow the prosecution to lose momentum. She noted further that the employee was aware of the allegations against him, was legally represented and had ample time to prepare. He was therefore not disadvantaged by conducting the enquiry remotely, and the extraordinary circumstances prevailing at the moment justified that the matter proceed by videoconferencing (*Transnet Pipelines and Ndlovu* at 1809).

*Quote of the Month:*

Sutherland JA in *National Union of Metalworkers of SA v Commission for Conciliation, Mediation & Arbitration & others* (2020) 41 ILJ 1629 (LAC):

‘The notion that, for the practical purposes of regulating employment conditions in economic activities, by assigning some enterprises to one or other bargaining council, proceeds from the foundational idea that “grouping” like with more or less alike is a sensible pragmatic approach. Central thereto is the attempt, by the use of words, to describe the supposedly distinguishable economic activities in definitions which are almost always complex, wordy and often hair-splitting. The task aims at describing the characteristics or attributes of industrial activities. Then the characteristics or attributes of a business enterprise are described and the two are compared. Just as it is not objectively possible to determine when night ends and day begins, and a practical answer depends on what you want to pinpoint that moment for, so it is with demarcation of so-called distinct “industries”.’