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Juta General Law

Ground Floor, Sunclare Building, 21 Dreyer Street, Claremont,
Cape Town, South Africa
PO Box 14373, Lansdowne 7779; Docex Number: DX 326, Cape Town
Tel: +27 21 659 2300, Fax: +27 21 659 2360

Website: www.juta.co.za; e-mail:cserv@juta.co.za

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HIGHLIGHTS TO THE INDUSTRIAL LAW REPORTS

The Constitution and Role of NEDLAC

The Supreme Court of Appeal recently in *Confederation of SA Workers Unions v NEDLAC & others* revisited the history leading to the formation of NEDLAC, and its role as a forum for attempting to reach tripartite consensus between government, organized business and organized labour on national economic and labour policy. The appellant trade union federation had been denied entry to the labour constituency of NEDLAC because it did not meet the criteria for admission set by that constituency. It claimed that those criteria should be set by NEDLAC itself, not by the constituency concerned, and challenged the validity of certain clauses of NEDLAC's constitution. The SCA noted that the National Economic, Development and Labour Council Act 35 of 1994 left NEDLAC to formulate its own constitution after its establishment, and merely required that in doing so it should provide for certain criteria, including the criteria for admission to its various constituencies. NEDLAC's constitution empowered the labour constituency to set its own criteria for admission, and it had set a requirement that a labour federation had to represent at least 300,000 employed workers. The SCA endorsed this arrangement, pointing out that the interest of each constituency lay in confronting the most influential and cohesive voice of the other, and that must necessarily be one chosen by the particular constituency. As CONSAWU did not meet this criterion it had correctly been denied membership.

The Jurisdiction of Bargaining Councils

The Supreme Court of Appeal has now, in *Johannesburg City Parks v Mphahlani NO & others* overruled the earlier decision of the Labour Appeal Court between the same parties published in (2010) 31 *ILJ* 1804 (LAC). That court had found that it was not necessary in terms of s 62(3A) of the Labour Relations Act 66 of 1995 to adjourn a bargaining council arbitration concerning an alleged unfair dismissal pending the finalization of a demarcation dispute before the CCMA to determine whether the employer party fell within the registered scope of the bargaining council. The SCA found that the court below had interpreted s 62(3A) incorrectly. The nub of the enquiry was simply whether the arbitrator had jurisdiction to arbitrate the matter. In strict compliance with s 62(3A) the arbitrator was bound to adjourn the matter on being advised that such a demarcation dispute was pending. The contention that the arbitrator's decision could later be taken on review was untenable and could not have been the intention of the legislator.

Vicarious Liability

By a majority of three to two the SCA in *Minister of Safety & Security v F* has overturned a High Court judgment in which the court found the minister vicariously liable for the criminal actions of a police officer who raped a young girl while off duty but on standby. The court had reference to the Constitutional Court decision in *N K v Minister of Safety & Security* (2005) 26 *ILJ* 1205 (CC), in which the minister was held vicariously liable for the actions of police officers who raped a girl while on duty. The court found that the inference to be drawn from that case was that the employer was vicariously liable for the officers' omissions in failing to protect the girl while on duty, and not for their positive delictual acts.

In the case before it the officer, although on standby, was not in any way engaged on police business at the time of the rape, and was not subject to his employer's control or direction. There was therefore no sufficiently close link between his acts and the business of his employer to render the latter vicariously liable for his criminal act.

The Validity of Arbitration Agreements

In *Volkswagen SA (Pty) Ltd v Koorts NO & others* the parties entered into a private arbitration agreement mistakenly believing that they could agree that the standard of review should be that laid down in s 145 of the LRA 1995. When the arbitrator found against the employer, the employer found before the Labour Court that it could only challenge the award on the limited grounds contained in s 33 of the Arbitration Act 42 of 1965. It then challenged the validity of the agreement on the ground of common mistake. On appeal the Labour Appeal Court considered legal authority on the issue and concluded that, had the parties been made aware of their mistake of law they would, in all probability, have chosen to proceed with the agreement in any event on the basis of the limited grounds of review contained in s 33, and that the mistake had not vitiated the agreement.

Strikes and Secondary Strikes

The Labour Appeal Court had the opportunity in *SA Local Government Association v SA Municipal Workers Union* to consider the meaning of s 66(2)*(c)* of the LRA 1995, that requires that, to be afforded protection, the nature and extent of a secondary strike has to be reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer. The Labour Court had found a one-day secondary strike by municipal employees in support of public servants employed at national and provincial level to be reasonable and to be protected. On appeal the LAC agreed that municipalities play a role in the activities of national and provincial government, and that the secondary strike would have some impact on the bargaining process between the primary employer and the trade union involved in the primary strike. The court found that it was not a requirement of s 66 that the secondary employer should itself exert influence on the primary employer to encourage it to compromise, but only that the secondary strike should have a possible direct or indirect effect on the business of the primary employer. The strike was found to be reasonable, and was protected.

In *City of Johannesburg Metropolitan Municipality & another v SA Municipal Workers Union & others*, one of a series of applications to court arising from the employer's introduction of a changed shift system for municipal bus drivers and their proposed strike action over the issue, the Labour Court found that, to the extent that earlier judgments required the articulation of a demand and its rejection prior to either party invoking the statutory dispute-resolution mechanisms, this interpretation was not supported by the wording of the LRA. The basic requirements for a protected strike were that there should be a grievance or dispute over a matter of mutual interest between employer and employee. There was no statutory requirement for a 'deadlock' before the matter was referred for conciliation. The court further found that it was not necessary that conciliation should actually have taken place as s 64(1)*(a)* only required that 30 days should have elapsed since the date of referral. The court accordingly found there was no discernable barrier to the union's proposed strike action and dismissed the employers' application for an interdict.

Suspension Pending Disciplinary Proceedings

In *SA Municipal Workers Union of behalf of Mathabela v Dr J S Moroka Local Municipality* the employee's contract of employment contained a requirement that any disciplinary hearing should be held within 60 days of the employee being suspended. When a disciplinary hearing was commenced within, but extended beyond that period, the Labour Court held that this breached the employee's contract of employment, and granted an urgent order directing the employer to uplift the employee's suspension.

The Right to Engage in Collective Bargaining

In *National Entitled Workers Union v Leonard Dingler (Pty) Ltd* the Labour Court refused to grant an urgent order declaring that, after its deregistration by the Registrar of Labour Relations, the applicant union still retained its right to engage in collective bargaining with the respondent in terms of s 23(5) of the Constitution 1996. The court had reference to recent decisions by the superior courts confirming that the constitutional right to engage in collective bargaining does not entail a right to compel bargaining. It found that the order sought would therefore have no practical consequences and was reluctant to grant an order which was academic and had no practical effect.

Retrenchments

Where the employee declined to take part in consultations prior to retrenchment, the Labour Court held in *Taylor & another v ILC Independent Loss Consultants CC* that the employer was entitled to impose its own selection criteria, provided that these were fair and objective. In *Nazo & others and Estiaan Pienaar Builders* the commissioner endorsed the right of retrenched employees to include statutory amounts due to them in a claim for severance payments after their retrenchment.

Facilitation Proceedings in Large Scale Retrenchments

The Labour Court was required in *National Union of Mineworkers v Commission for Conciliation, Mediation & Arbitration & others* to consider the powers and duties of a facilitator appointed in terms of s 189A(3) of the LRA 1995 in a major retrenchment exercise involving more than one union and some 454 employees. Two unions had objected to the appointment of a single facilitator and requested that each of the employer's operations be allocated its own facilitation process. The facilitator ruled accordingly. On review the court set aside the facilitator's ruling, finding that the process was designed to encourage the parties to reach their own agreement, and that the Facilitation Regulations did not empower the facilitator to make substantive decisions affecting the rights of the parties or to make binding rulings concerning the level at which consultations should take place.

Dismissals – Fair and Unfair

The employee party in *Nitrophoska (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* was dismissed for dereliction of his duty as manager when he failed to detect that employees under his control were engaging in fraud. The Labour Court upheld the dismissal, finding that the employee had conceded that he had failed in his duties and admitted a breakdown in the trust relationship, and that there was no need for a formal enquiry into the allegations against him.

The sales employee in *Mays and Labournet Central (Pty) Ltd* consistently failed to reach his sales target and was eventually dismissed for poor work performance. The CCMA commissioner considered the requirements of items 8 and 9 of the Code of Good Practice: Dismissal and found that, although the employee had clearly failed to meet the required standard the employer had failed to investigate the reasons for this, or to offer proper instruction, training, guidance or counselling, and that his dismissal was not for a fair reason and in accordance with a fair procedure. In *Molomo and Royalserve (Pty) Ltd*, in which a probationary employee was dismissed on similar grounds, the commissioner found that the employee had been afforded a proper chance to improve, but that she should also have been given a chance to make representations about her possible dismissal, which was therefore procedurally unfair.

Constructive Dismissal

In *Pienaar and Family Funeral Services* the arbitrating commissioner again considered the elements necessary to constitute a constructive dismissal, and found that the fact the employer had unilaterally amended the employee's terms and conditions of employment did not amount to a constructive dismissal justifying the employee's decision to resign because the employee had other courses of action open to him. His decision was therefore taken prematurely.

Bargaining Councils, Compliance Orders and Certificates

In *National Bargaining Council for the Clothing Manufacturing Industry v J 'n B Sportswear & another* the applicant bargaining council sought to enforce the payment of monies allegedly owing to an employee in terms of its collective agreement and the matter was referred to arbitration. The arbitrator found, inter alia, that the council was estopped from claiming that the employer was not compliant because it had previously issued compliance certificates, representing that the employer was compliant. On review the Labour Court set aside those findings. The court found that the issue of a compliance certificate was merely an administrative function which did not confer any rights, and that the council could not be estopped from exercising its statutory powers in order to enforce its agreements.

Orders Postponing Disciplinary Hearings

The High Court in *Ngubane v Department of Co-operative Governance & Traditional Affairs & another* confirmed a rule nisi ordering the postponement of disciplinary proceedings against a public service employee pending the outcome of an appeal in terms of s 74 of the Promotion of Access to Information Act 2 of 2000. The court found it to be a fundamental principle that the employee was entitled to a procedurally and substantively fair hearing, and that it was clear on the evidence that the frequently postponed disciplinary hearing was defective in several respects. In *Mahlalela v Office of the Pension Funds Adjudicator* the Labour Court considered when it would be justified in intervening in uncompleted disciplinary proceedings pending a review, and found that it would only be entitled to do so in exceptional circumstances, and that the employee party had not shown that such intervention would prevent grave injustice. The court further found that, in the absence of a specific provision in his contract of employment to the contrary, the employee could not rely on an implied contractual term that his employer was under a common-law duty to act fairly in its dealings with him.

Practice and Procedure

In an application to rescind a default judgment the applicant denied in *Gay Transport (Pty) Ltd v SA Transport & Allied Workers Union & others* that it had received the statement of claim by fax, and submitted that the judgment had therefore been erroneously sought and granted in its absence. The Labour Court found that the onus was therefore on the respondent to show that the applicant had in fact received the statement of claim. As there was no conclusive evidence to this effect the court found that the judgment had been erroneously granted in the absence of the applicant, and granted an order for its rescission. In *Joubert v Legal Aid South Africa* the applicant maintained that he was entitled to a post-retirement medical aid benefit in line with other members of the public service. The Labour Court found that the Legal Aid Act 22 of 1969 did not render the respondent's employees members of the public service, and granted the respondent absolution from the instance. The court dismissed the applicant's plea of estoppel based on his allegation that the respondent had represented to him that its employees were entitled to such benefits, finding that the respondent could not be bound by way of estoppel to act beyond its powers.
In *Meyer v Horizon Carpet Manufacturers CC & others* the Labour Court refused to grant an amendment to the respondent's pleadings which would result in part of the applicant's statement of claim being excipiable. That would require the applicant to bring a separate claim in the High Court in respect of that portion, which would lead to additional costs and delays, and would not be in accordance with the purpose of the LRA to resolve labour disputes effectively. The court further found that it could lift the corporate veil and consider whether the single sole member of the two respondent close corporations should be held personally liable for their debts in terms of the BCEA 1997, and for UIF and PAYE contributions. The Labour Court also refused in *National Education Health & Allied Workers & others v Vanderbijlpark Society for the Aged* to condone the applicant union's late filing of its statement of claim, or to accept its explanation that it was a large organization and so took time to obtain the necessary approvals. The union was aware that it had to act in the interests of its members and its size was no justification for delay.
In *Pioneer Foods (Pty) Ltd t/a Sasko Milling & Baking (Duens Bakery) v Commission for Conciliation, Mediation & Arbitration & others* the Labour Court also found that although, in con-arb proceedings, a commissioner was obliged to commence the arbitration immediately after certifying that the matter remained unresolved, he or she still retained a discretion to postpone the matter at the request of a party, and had to exercise that discretion reasonably.

Evidence – Estoppel

In *Ndimande and Banana Cabanas* the arbitrating commissioner held that, having requested her employer to provide her with a UI.19 form to enable her to claim unemployment benefits, the employee party was later estopped from asserting that she had not in fact been dismissed at that time.

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Ground Floor, Sunclare Building, 21 Dreyer Street, Claremont,
Cape Town, South Africa
PO Box 14373, Lansdowne 7779; Docex Number: DX 326, Cape Town
Tel: +27 21 659 2300, Fax: +27 21 659 2360

Website: www.juta.co.za; e-mail:cserv@juta.co.za

Juta and Company Ltd, REG. NO. 1919/001812/06, VAT REG. NO. 4520113319