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Please forward any comments and suggestions regarding the Industrial Law Journal preview to the publisher, Anita Kleinsmidt akleinsmidt@juta.co.za

**Kind regards**

**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 FROM THE INDUSTRIAL LAW REPORTS

**Retrenchment**

In *GE Security (Africa) v Airey & others* (at 2078) the parties had, after a joint consensus-seeking process, agreed on the selection criteria to be employed when selecting employees for retrenchment following a restructuring exercise. This included a requirement that they should apply for all posts in the new structure in which they were interested. The Labour Court had found that the employees had tacitly accepted the employer's proposed criteria, but that the employer was still obliged to consider placing the employees in posts other than those they had actually applied for before retrenching them. On appeal the Labour Appeal Court overturned that decision, finding that the employer was under no obligation to consider employees for positions for which they did not apply, nor to consider an employee who was not placed in a senior position for a lower position for which he had not applied before retrenching him.

*National Union of Mineworkers & others v Revan Civil Engineering Contractors & others* (at 2167) concerned a retrenchment exercise involving three interlinked companies in the civil engineering industry. Each company issued a separate retrenchment notice in terms of s 189 of the Labour Relations Act 66 of 1955, although when the matter came before the Labour Court the companies conceded that all three should be regarded as one entity, and that the retrenchments should have been governed by s 189A of the LRA. The court refused to grant a final order declaring the s 189 notices to be unlawful and invalid, finding that such an order could only be granted on an interim basis pending compliance with the requirements of s 189A. However, the court found that the companies had been trying to avoid the need to comply with the provisions of s 189A, and that this had rendered the retrenchment exercise procedurally unfair.

**Trade Unions and Employers' Organizations — Consequences of Deregistration**

In *National Entitled Workers Union & others v Director, Commission for Conciliation, Mediation & Arbitration & others* (at 2095) the Labour Appeal Court had to determine whether the decision by the Registrar of Labour Relations to deregister a trade union was suspended pending an appeal to the LAC against that decision. The court considered the purpose of s 106 of the LRA, which was to protect employees from exploitation by organizations claiming to represent them, and found that the common-law rule that execution of a judgment is automatically suspended pending an appeal does not automatically apply to appeals from administrative decisions. A decision whether or not to suspend a deregistration pending an appeal should therefore only be taken after a consideration of all the relevant factors, including the potential for harm or prejudice to either party and the public interest.

**Strikes and Strike Issues**

The Labour Appeal Court considered the definition of a strike in *National Union of Mineworkers on behalf of Employees v Commission for Conciliation, Mediation & Arbitration & others* (at 2104), and concluded that it has three key characteristics: there must be an act or omission; it must be concerted, and it must be directed at achieving a specified purpose. The court rejected the argument that a collective refusal to work would only amount to a strike where the dispute concerned a matter of mutual interest, and not where it concerned a matter of right. A work stoppage in response to an employer's unlawful deduction of employees' moneys was held to amount to a strike and, since the procedures set out in s 64 had not been followed, to be unprotected. However, the court found that this factor was not a licence to dismiss in all circumstances, and that the decision to dismiss must be fair and appropriate. In *Transnet Ltd v SA Transport & Allied Workers Union & others* (at 2269) employees coupled a demand relating to the employer's shift roster system with a demand for the dismissal of a manager, and proposed to take strike

action. The Labour Court found on the first issue that the strike notice had been defective and that the matter in dispute was subject to a binding collective agreement. On the second issue the employees' demand required the employer to dismiss the manager unlawfully, and was therefore itself unlawful. The proposed strike was unprotected and was interdicted.

**Dismissal by Operation of Law — Namibian Public Service**

The Labour Court of Namibia found in Gouws v Office of the Prime Minister (at 2319) that a public service employee who had been absent from his office or official duties without permission for more than 30 days was deemed to have been discharged in terms of the Namibian Public Service Act 13 of 1995. The court first considered how the number of days should correctly be calculated, and thereafter confirmed the employee's deemed discharge. It was not necessary that the employee should have absconded or disappeared.

**Fixed-term Contract — Expectation of Renewal**

In *Joseph v University of Limpopo & others* (at 2085) the Labour Appeal Court found that the requirements of the Immigration Act 13 of 2002, which required a non-South African citizen to hold a valid work permit before taking up employment, were not a factor that prevented such an employee from entertaining a reasonable or legitimate expectation that his fixed-term contract of employment at the respondent university would be renewed. There was no reason why, had his contract been renewed, his work permit would not have been renewed as in the past.

**Employment Equity Act 55 of 1998**

The *Labour Court found in Matjhabeng Municipality v Mothupi NO & others* (at 2154) that, where an employee alleged that he had been subjected to unfair discrimination on an unlisted ground in terms of the EEA (lack of experience), the onus remained on the employee to prove the discrimination and to prove that the discrimination was unfair. In the case before the court the employee had failed to discharge that onus.

**Protected Disclosures Act 26 of 2000**

In *Feni v Pan SA Language Board* (at 2136), in which an employee claimed that he had been automatically unfairly dismissed for making a protected disclosure, the Labour Court found that it lacked jurisdiction to hear the matter as the employee had not first referred the dispute to the CCMA for conciliation. The dispute must then be referred by way of a statement of claim in terms of the court rules. It was not open to the employee to approach the court on motion.

**Skills Development Act 97 of 1998**

Both *Services Sector Education & Training Authority & others v Minister of Higher Education & Training & others* (1) (at 2225) and *Services Sector Education & Training Authority & others v Minister of Higher Education & Training & others* (2) (at 2251) concerned the same SETA, which had been established in accordance with the terms of the Skills Development Act 97 of 1998. In April 2011 the respondent minister purported to appoint a new chairperson and council to manage the SETA, and prescribed a new constitution for it. The minister also appointed the new chairperson as administrator of the SETA and directed that its funds be transferred to the National Skills Fund. The SETA's original CEO and council, together with certain trade union federations and employer organizations represented thereon, made two urgent applications to the Labour Court requesting that the various actions taken by the minister be set aside. Both applications were successful. After carefully considering the minister's actions having regard to the requirements of the Act, the first court concluded that the minister had acted beyond the scope of

his powers. Further, the minister had no authority to impose the new constitution on the SETA and the proposed constitution was itself in conflict with the provisions of the Act. In the second application the court set aside the appointment of the administrator, finding insufficient evidence of financial mismanagement to warrant such an appointment.

**SA Police Service**

In *Sekwati v Masiya & others* (at 2219) a member of the SAPS was suspended without pay on charges of fraud. After he was exonerated on criminal charges he brought an urgent application to have his suspension set aside. The Labour Court noted that the fact of his acquittal on criminal charges did not prevent the employer from proceeding with disciplinary charges arising from the same facts. The court also examined the relevant police regulations, which provided for suspension without pay where an employee failed to attend a disciplinary hearing, and found that such suspension was probably automatic. The matter was held not to be urgent.

The arbitrator in Ngobeni and SA Police Service (at 2296) held that the continued suspension of an officer without pay after his disciplinary enquiry had been postponed sine die amounted to an unfair labour practice, and ordered the suspension to be lifted. In Police & Prisons Civil Rights Union on behalf of Mabena and SA Police Service (at 2299) and in Police & Prisons Civil Rights Union on behalf of Mogadime and SA Police Service (at 2303) the arbitrators considered the implications of the deemed suspension of police officers in terms of the SAPS Discipline Regulations after their dismissal and pending an appeal. Steyn and SA Police Service (at 2309) concerned the termination of an officer's services on the ground that he was unfit to remain in the SAPS while suffering from post traumatic stress disorder as the result of an injury sustained while on duty. The arbitrator reviewed the relevant regulations and awarded compensation.

**Administrative Law — Unfair Suspension**

Taung Local Municipality v Mofokeng (at 2259) concerned the suspension of a municipal manager pending investigations into alleged mismanagement. The manager contended that the municipality's resolution to suspend him was unlawful because it was taken without the necessary quorum. The Labour Court considered in detail the judicial authorities on the validity of unlawful administrative acts, and found that the resolution, while it existed in fact, was a legal nullity because it undermined the rule of law and also the manager's constitutional right to fair labour practices.

In Thomas and Northern Cape Provincial Legislature (at 2290) the CCMA commissioner held the suspension of a public servant on full pay for more than 60 days, in contravention of the employer's disciplinary code, to constitute an unfair labour practice, and ordered his immediate reinstatement.

**Residual Unfair Labour Practices**

The Labour Court held in *Farhana v Open Learning Systems Education Trust* (at 2128) that a salary increase did not amount to a 'benefit' within the meaning of s 186(2)(a) of the LRA; therefore an employer's failure to grant such an increase in line with those granted to other employees did not constitute an unfair labour practice capable of adjudication by the court. In *Independent Municipal & Allied Trade Union on behalf of Verster v Umhlathuze Municipality & others* (at 2144) the Labour Court considered judicial authority on the concept of a 'benefit' and noted that, although the initial view was that there had to be some existing entitlement based in contract, collective agreement or statute, more recent interpretations of that term included advantages which had been granted at the employer's discretion. The court included an 'acting allowance' under this heading. Compensatory relief was awarded in *SA Municipal Workers Union & another v Emalahleni Local Municipality & others* (at 2196) to an employee who, although the second best candidate for a local government position, was not appointed to that position when the best candidate did not take up the post. The Labour Court found that the

municipality had not followed its own policy in this respect, and had provided no rationale for its decision to re-advertise the position.

**Bias in Arbitration Proceedings**

Where the applicant in *Raswiswi v Commission for Conciliation, Mediation & Arbitration & others* (at 2186) complained that a CCMA commissioner had been biased against him in conducting arbitration proceedings, the Labour Court considered the test for bias as refined in judgments of the Constitutional Court and, applying that test, found that the commissioner had indeed shown bias against the applicant in the manner in which he had intervened in the proceedings and had cross-questioned him. The award was set aside.

**Rescissions, and Rescissions of Rescissions**

The employee parties in *Booysen Bore Drilling (Pty) Ltd v National Union of Mineworkers & others* (at 2075) had referred a matter to the Labour Court outside the prescribed time-limits, and had obtained default judgment in their favour. The employer applied to the Labour Court to have that judgment rescinded on the ground that the employees had not applied for condonation of their late referral, but its application was refused. On appeal the Labour Appeal Court held that, since no application for condonation of the late referral had been heard or granted, the Labour Court had no jurisdiction to entertain the matter, and ordered the judgment to be rescinded.

In September and Barplats Mines Ltd (at 2283), after a CCMA commissioner dismissed an unfair dismissal application, a different commissioner purported to rescind that decision and a third to rescind the second commissioner's ruling. When the matter came before a fourth commissioner he ruled that he was functus officio. The circumstances in which a commissioner might vary or rescind an award or ruling were strictly prescribed by s 144 of the LRA, otherwise the decision must stand until set aside on review by the Labour Court.

**Practice and Procedure — Late Referral**

In *Baldwin Steel & another v National Union of Metalworkers of SA & others* (at 2116) the Labour Court granted the employers' application to dismiss the employees' referral of a retrenchment dispute due to unreasonable delay in prosecuting the matter over a period of nearly ten years. The court stressed that dismissal of an applicant's claim was an exceptional remedy, but found that the employees' explanation for the delay was unsatisfactory, and that the employer would be gravely prejudiced after such a lengthy delay. The employees could not hide entirely behind their union's negligence, and had to share the responsibility for ensuring that the matter was pursued diligently. In the same vein, the court in *Seatlolo & others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)* (at 2206) refused to permit the claims of two groups of applicants which were well out of time to be joined to the claim of a third single applicant which had been referred timeously, and held that the employees concerned could not simply blame their union for the unexplained delays. Similarly, *in Balmer & others v Reddam (Bedfordview) (Pty) Ltd* (at 2121) the Labour Court refused to condone the employees' late filing of their statement of claim in a retrenchment dispute where the employees had offered no reasonable explanation for the delay, and where they had rejected the employer's unconditional offer of reinstatement.

**Practice and Procedure — Other Matters**

The employees in *SA Transport & Allied Workers Union v ADT Security (Pty) Ltd* (at 2112) appealed against the grant by the Labour Court of an urgent interdict prohibiting them from gathering or picketing on a specific day in 2008. When the appeal came to be heard the Labour Appeal Court found that the matter had become moot as it no longer presented an existing or live controversy that required

determination. The appeal was in effect an appeal for legal advice from the court, an invitation which the court declined. In *Ngaka Modiri Molema District Municipality v Ramphele & others* (at 2181) the Labour Court set aside a writ of execution issued by the registrar to enforce a judgment because the order on which it was based had not been quantified. The court held that the registrar had no power to determine from evidence not presented to the court what the specific amount to be paid should be. The court also held that after issuing a writ in execution the registrar was not functus officio, but could issue as many writs as were necessary to satisfy the judgment debt.

**Evidence**

Relying on the recent decision of the Labour Appeal Court in *Foschini Group v Maidi & others* (2010) 31 ILJ 1787 (LAC), the arbitrating commissioner in *Matsebane and Urban Africa Security* (at 2277) admitted into evidence a computer generated print-out to prove a security guard's absence from his post during patrol duty.

**Dismissal — Incapacity**

Following a non-work related injury the employee was unable to perform his functions as a boilermaker. An incapacity enquiry was conducted and, with the agreement of the employee, the employer terminated his employment. The employer assisted the employee with his disability claim, but when this failed, the employee belatedly brought an unfair dismissal claim. A CCMA commissioner refused to grant the employee condonation for the late referral of his claim. The employee approached the Labour Court to review this decision. The court, however, agreed with the commissioner that the employee had demonstrated no willingness to question his dismissal until his disability claim had been denied by the insurer and that this affected the merits of his claim that he had been unfairly dismissed. Moreover, the employee had not given an adequate reason for the delay. The court upheld the condonation ruling by the CCMA *(Du Plessis v Commission for Conciliation, Mediation & Arbitration & others* JR2676/08 dated 15 February 2011*).*

**Dismissal — Misconduct**

The managing director of the respondent company had been dismissed for misconduct as he had granted himself increases in remuneration, bonuses and other unauthorized payments. A CCMA commissioner found his dismissal to be fair, and the Labour Court upheld the award on review. On appeal the Labour Appeal Court found that the evidence before the commissioner clearly indicated that the managing director had placed his interests above those of his employer in breach of his fiduciary duties. The conclusion reached by the commissioner was, therefore, one that a reasonable decision maker could reach and the Labour Court had not misdirected itself in upholding the award *(Dell v Seton SA (Pty) Ltd & others* JA33/09 dated 8 April 2011*).*

**Dismissal — Poor Performance**

In *Imperial Bank Ltd v Commission for Conciliation, Mediation & Arbitration & others* (JR1942/09 dated 10 February 2011) the Labour Court declined to interfere with a CCMA commissioner's finding that the employee had not been given sufficient time to improve his performance and that his dismissal had been too harsh a sanction. It upheld the commissioner's award that the employee be reinstated.

**Interference in Penalty Handed Down by Disciplinary Chairperson**

Where a collective agreement obliged the employer to implement the decision of a chairperson of a disciplinary hearing, the Labour Court found that the employer was not entitled to rely on a practice that

had developed in terms of which it regularly interfered with such decisions without any objection by the unions, to ignore the sanction of suspension without pay imposed by the chairperson and to dismiss an employee. The court therefore upheld an arbitration award in which the dismissal of the employee was found to be substantively and procedurally unfair *(SA Revenue Services v Commission for Conciliation, Mediation & Arbitration & others* D393/07 dated 30 December 2010*).*

**Review of CCMA and Bargaining Council Awards**

The Labour Court noted, in *Khosa & another v SA Police Service & others* (JR12497 dated 2 February 2011), that in review proceedings an arbitration award must be read as a whole together with the record of the arbitration proceedings to determine whether it meets the standard of reasonableness set in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) and subsequent cases and to determine whether it falls within any of the transgressions set out in s 145(2) of the LRA 1995. Relying on this approach, the court refused to set aside an arbitration award which upheld the dismissal of two police officers. Similarly, in *Rickert v Department of Correctional Services & others* (JR1526/08 dated 27 November 2009), *Prowalco (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (P608/09 dated 5 April 2011) and *Northam Platinum Ltd v Mashego NO & others* (JR1504/08 dated 23 March 2011) the court declined to set aside arbitration awards where it was satisfied that the decisions reached were reasonable taking into consideration the facts and circumstances of each case.

In *Department of Health & Social Development (Limpopo Province) v Nzadi & others* (JR747/08 dated 2 February 2011), the Labour Court declined to set aside a bargaining council award in terms of which the arbitrator had found the failure to promote several medical officers to be an unfair labour practice.

The Labour Court reviewed and set aside an arbitration award after finding that the CCMA commissioner had failed to consider the issue of consistency which had been specifically raised by the applicant employee. According to the court consistency is central to the issue of fairness of a sanction and this is reflected in item 7 of the Code of Good Practice: Dismissal. It remitted the matter for rehearing before another commissioner *(Chetty v Toyota SA (Pty) Ltd & others* D224/06 dated 18 February 2011).

In *Telkom Ltd v Commission for Conciliation, Mediation & Arbitration & others* (JR1538/09 dated 23 March 2011) the Labour Court reviewed and set aside an arbitration award on the grounds that the CCMA commissioner had fundamentally misunderstood the rules of evidence, especially the principles governing mitigation. Where a bargaining council arbitrator had made a material error of law in applying the cautionary rule to the evidence of the employer's only witness and had evaluated the evidence of the employee on his credibility and demeanour only with no reference to the inherent probabilities of his testimony, the court found that the employer had not been given a fair hearing. In the interests of justice the court granted the employer condonation for the late filing of its review application, reviewed and set aside the award and referred the matter back to the council for hearing before another arbitrator *(Minister of Correctional Services v Baloyi & others* JR46/09 dated 29 April 2011*).*

**Disciplinary Enquiry by Arbitrator Appointed by Bargaining Council**

A disciplinary enquiry into misconduct by an employee had been chaired by an arbitrator appointed by the GPSSBC in terms of a collective agreement. The employee failed to attend her hearing and was dismissed. The GPSSBC declined to rescind the finding of the arbitrator on the ground that it had no jurisdiction. On review the Labour Court found that the proceedings conducted by the arbitrator were not pre-dismissal proceedings envisaged by s 188A of the LRA 1995 and did not amount to arbitration proceedings conducted under the auspices of the bargaining council. The GPSSBC had correctly found that it did not have jurisdiction to rescind the dismissal *decision (Abrahams v General Public Service Sectoral Bargaining Council & others* JR1790/08 dated 2 February 2011*).*

**Suspension Pending Disciplinary Proceedings**

The Labour Court refused to grant an interdict setting aside the employee's suspension where it appeared that the employer bank had good cause for pursuing disciplinary steps against the employee — he had threatened to report corruption and mismanagement at the bank, but had refused to disclose information to substantiate his allegations and had not used the appropriate channels for making a protected disclosure *(Tigerls v Development Bank of Southern Africa & others* J2242/10B dated 1 March 2011*).*

**Practice and Procedure**

After a bargaining council arbitrator confirmed that the employees were guilty of defrauding the employer, he found that dismissal was too harsh a sentence and reinstated them. The employer sought to review the decision, but there were excessive delays in obtaining the transcription of the arbitration record. The employees approached the Labour Court to have the review application dismissed. The court restated the principles applicable and found that, although the delay was unreasonable, there were good prospects of success on review and accordingly exercised its discretion to refuse the application to *dismiss (Member of the Executive Council, Department of Housing & Local Government, Limpopo Province v General Public Service Sectoral Bargaining Council & others* JR1985/2006 dated 10 February 2011*).* Similarly, the court, in *Independent Municipal & Allied Trade Union v Lesedi Local Municipality & another* (JR2836/08 dated 16 March 2011), refused to dismiss a review application because it was satisfied that the delay in prosecuting the review had been for reasons beyond the control of the respondent municipality. However, in *General Industrial Workers Union of SA & another v Mphaphuli NO & others* (JR598/07 dated 13 January 2011), the court granted the application to dismiss the review application because of the employee's excessive delay in prosecuting his review.

In *K Carrim Group Wholesale Hardware (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (JR2655/08 dated 25 February 2011) the Labour Court declined to condone the late filing of a review application where the delay was excessive (110 days) and the prospects of success were not strong. Similarly, in *Saficon Industrial Equipment (Pty) Ltd t/a Toyota Forklift v Metal & Engineering Industries Bargaining Council & others* (P645/09 dated 13 April 2011) the court found that, although the applicant had tendered some explanation for the late referral of its review application, it had failed to explain the delay of 11 months in filing its condonation application even after the need to do so had been pointed out to it on several occasions.

The Labour Court refused to rescind a judgment granted in a review application where it was clear that the applicant had opposed the review application merely to delay matters; had not set out a bona fide defence to the review, and had failed to show that the judgment was erroneously granted in its absence *(Ngaka Modiri Molema District Municipality v Ramphele* JR977/09 dated 16 February 2011*).* In *Algem Security Technology CC v SA Transport & Allied Workers Union & others* (JS1340/09 dated 29 April 2011) the court also declined to rescind an order granted by default as the applicant failed to show good cause and its conduct in dealing with the matter amounted to gross negligence.

In *Health & Other Services Personnel Trade Union of SA & others v Member of the Executive Council, Department of Health, Eastern Cape* (D464/09 dated 4 November 2011) the Labour Court, having dismissed an exception that the applicants' statement of claim did not disclose a cause of action, found that it did not have jurisdiction as the dispute related to the application of a collective agreement and had to be referred to arbitration.

Where the applicant for review had been unable to obtain a proper arbitration record and had nonetheless referred the matter to the Labour Court, the court found that the dispute was not able to be resolved without the record. It ordered the parties to meet to reconstruct the record *(Independent Municipal & Allied Trade Union v Lesedi Local Municipality & another* JR2836/08 dated 16 March 2011*).*

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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