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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

HIGHLIGHTS FROM THE INDUSTRIAL LAW REPORTS

No Constitutionally Protected Right to Riot

The Supreme Court of Appeal has in *SA Transport & Allied Workers Union v Garvis & others* (at 2426) upheld the judgment of the High Court in *Garvis & others v SA Transport & Allied Workers Union* (2010) 31 *ILJ* 2521 (WCC), in which that court held the trade union party liable in terms of s 11(1) of the Regulation of Gatherings Act 205 of 1993 for damage caused to traders and property owners in Cape Town as the result of a protest march which descended into chaos and rioting. The SCA found the right to assemble and to demonstrate enshrined in s 17 of the Constitution was not implicated because the persons involved only had the right to assemble and demonstrate provided they did so peacefully and unarmed. The court found the provisions of s 11(2) not to be self contradictory and rejected the union's argument that if it was allowed to stand s 11(2) would have a chilling effect, because it would deter people from assembling and protesting. The court found that the chilling effect the Act should rightly have was on unlawful behaviour that threatened the fabric of society and undermined the rule of law.

No Appeal against the Dismissal of an Exception

In *Charlton v Parliament of the Republic of SA* (at 2419) the Supreme Court of Appeal has found that the Labour Appeal Court should not, after all, have heard and allowed an appeal from a ruling by the Labour Court dismissing the respondent's exception to the applicant's statement of claim. The SCA held it to be established law that the dismissal of an exception, save an exception to the jurisdiction of the court, is not appealable. The court therefore found the first of two exceptions raised before the Labour Court not to be appealable. The second, an exception to the Labour Court's jurisdiction, was found to be misconceived because the Labour Court had not in fact taken a decision on the issue. The LAC should therefore have struck the matter from the roll.

Dismissals for Dishonesty Upheld on Appeal

The Labour Appeal Court in *SA Post Office v Commissioner for Conciliation, Mediation & Arbitration & others* (at 2442) upheld the dismissal of an employee who had misrepresented in her application for employment that she had a valid driver's licence. At arbitration the commissioner had found the dismissal to have been unfair and had ordered her reinstatement, and the Labour Court had refused to review that finding. The LAC allowed the appeal, finding that the commissioner had misdirected himself by concluding that the employee had merely been negligent when misrepresenting her qualifications, and had ignored the fact that a valid driver's licence was a requirement for the job. To allow the award to stand would divest the employer of its right to set minimum standards for filling posts.

Similarly, in *Woolworths (Pty) Ltd v Commissioner for Conciliation, Mediation & Arbitration & others* (at 2455) the LAC allowed an employer's appeal against the refusal by the Labour Court to review and set aside an award reinstating an employee who had been dismissed for wrongfully concealing the employer's goods about her person, intending to deprive the employer of ownership. The LAC found that the court below had erred by finding that only the issue of sanction was being attacked, and had overlooked several other grounds for review. After viewing a video recording of the incident the court was in no doubt that the employee's explanation for the concealment was a shameless fabrication which had to be rejected. There was no rational basis on which the commissioner could have found that the employee was an honest and credible witness, and his finding was therefore one which a reasonable decision maker could not reach.

Redundancy or Automatically Unfair Dismissal?

The applicant in *Adams v DCD-Dorbyl Marine (Pty) Ltd* (at 2472) claimed that he had been automatically unfairly dismissed in terms of s 187(1)(*g*) of the Labour Relations Act 66 of 1995 when his position was declared redundant after a merger between his original employer and two other entities in the same line of business. The Labour Court considered whether the real reason for the employee's dismissal was related to his transfer from the first entity to the merged entity. The court found that the original employer was in dire financial straits before the merger, that the employee's position was in jeopardy in any event, and that the transfer was not the main, dominant or most likely cause of his dismissal. The dismissal was, however, found to be procedurally unfair.

Constructive Dismissal

The employee party in *Value Logistics Ltd v Basson & others* (at 2552) claimed that his resignation after being subjected to 'extreme pressure' to improve his work performance amounted to constructive dismissal. At arbitration the arbitrator agreed. After surveying the case law on the issue the Labour Court confirmed that the matter involved a two-stage enquiry: firstly, to prove the existence of the dismissal, and secondly, to consider whether it was fair. The court found that the arbitrator had erred in several respects, and had considered only the first stage of the enquiry. In the present case the employee had subsequently sought to withdraw his resignation, clearly indicating that the employment relationship had not become intolerable. The court set aside the award, and found that the employee had not been dismissed

Dismissal for Incapacity — Imprisonment

In *Mamabolo and Protea Coin Group (Pty) Ltd* (at 2583), in which a security guard was imprisoned for the theft of property belonging to the clients of his employer, the CCMA commissioner was required to determine whether his subsequent dismissal for incapacity was fair. The commissioner noted that the law had accepted that imprisonment could form the basis for a dismissal for incapacity, and found that it would, in any event, be outrageous to expect an employer to keep in its employ a convicted criminal who had stolen its client's goods. The employee was also no longer a 'fit and proper person to render a security service' within the meaning of the Private Security Service Industry Regulation Act 56 of 2001.

Dismissal — Strike Context

When the employer in *SA Transport & Allied Workers Union on behalf of Members and Successgate Investment CC t/a Successgate Security Services* (at 2589) advised its employees that it could not pay their wages until it in turn was paid by a client, the employees held a meeting to consider their position and to protest. The CCMA found their subsequent summary dismissal for striking to be substantively and procedurally unfair. No proof of strike action had been shown.

Fixed-term Contract — Expectation of Renewal

In *Member of the Executive Council for the Department of Finance: Eastern Cape v De Milander & others* (at 2521) the Labour Court held that at the time of the termination of a public service employee's fixed-term contract she had not acquired a reasonable expectation that her contract would be renewed, and so had not been dismissed. The court conducted a dual enquiry, firstly, into whether the employee had a subjective expectation that her contract would be renewed, and secondly, into the existence of the objective facts on which the expectation was based. The court found that she had not proved a subjective expectation and further that her contentions were not supported by the objective facts.

Unfair Labour Practices

The Labour Court in *City of Tshwane Metropolitan Council v SA Local Government Bargaining Council & others* (at 2493), when called on to consider whether the applicant council's failure to promote an employee amounted to an unfair labour practice, confirmed that a two-stage approach should be adopted. The employee first had to show that he or she was qualified for the post, and secondly had to show that the employer's decision to appoint someone else was unfair. The court confirmed an arbitrator's finding that the failure to promote was unfair, but set aside an award of reinstatement in favour of protective promotion.

The employee party in *Blessie and University of KwaZulu-Natal* (at 2574) claimed that his suspension on full pay pending a disciplinary hearing into alleged misconduct amounted to an unfair labour practice, and sought an order uplifting the suspension. The commissioner found that to suspend the employee for six months without taking any steps to initiate disciplinary action against him amounted to an unfair labour practice, ordered the suspension to be uplifted immediately, and awarded compensation.

SA Police Service

The Labour Court was approached in *De Beer v Minister of Safety & Security & another* (at 2506) to grant an urgent interim interdict to set aside the termination of a police officer's service in the SAPS pending the finalizing of his application for ill-health retirement. The court found that it had jurisdiction to hear the matter, and that the requirements for urgency had been met, but found on the merits that the officer had failed to show a prima facie right to the final relief that he sought, namely, that his dismissal had been unfair. A proper reading of the relevant regulations showed that an employee was required to apply for ill-health retirement before his contract of employment was terminated, whereas the employee had only made an approach to SAPS some two months later. The application was dismissed.

The Labour Court's Jurisdiction

The Labour Court had to consider in *Police & Prisons Civil Rights Union v Minister of Correctional Services & another* (at 2541) whether it had jurisdiction to review and set aside a housing policy for employees which had been approved by the respondent minister without first engaging in a collective bargaining process with the applicant union. The court found that unilateral approval of the policy was not valid, and that it was open to review on the basis of legality.

CCMA Jurisdiction

In *Parliament of the Republic of SA v National Education Health & Allied Workers Union on behalf of Members & others* (at 2534) the Labour Court considered the applicable legal principles and confirmed that commissioners must enquire into the existence of jurisdictional facts in order to establish their jurisdiction to arbitrate disputes. The commissioner is not bound by the employee's description of the dispute and must ascertain the real dispute between the parties. In the case before it the court found that the commissioner had wrongly classified the dispute as relating to a unilateral change to terms and conditions of employment, whereas in reality it concerned an alleged unfair labour practice relating to a failure to promote. As the dispute had been referred out of time and no application had been made for condonation, the CCMA lacked jurisdiction to hear the matter.

In *Abdullah and Oasis Group Holdings (Pty) Ltd* (at 2569) the CCMA commissioner similarly considered whether she had jurisdiction to arbitrate a dispute where the employee had already notified the employer of her intention to resign from her employment, subject to working out her three months' notice period. Although the employer maintained that the employment relationship had already terminated, the commissioner ruled that the employee remained in employment until the end of her notice period, and

that the CCMA had jurisdiction to arbitrate a dispute over the employer's refusal to let her work out her notice period.

Disciplinary Code and Procedure

In *Armstrong v SA Civil Aviation Authority* (at 2487) the Labour Court, after considering when the circumstances would justify a court intervening in uncompleted disciplinary proceedings, refused to interdict the continuation of disciplinary proceedings against the applicant, finding that the applicant had not shown that his case was exceptional, and that the court's failure to intervene would lead to grave injustice. The court also found that the applicant had not discharged the onus on him to show a reasonable suspicion of bias on the part of the chairman of the enquiry.

The Prescription of Awards

The Labour Court in *Magengenene v PCC Cement (Pty) Ltd & others* (at 2518) refused an application to make an arbitration award an order of court in terms of s 158(1)(*c*) of the LRA after a delay of eight years. The court confirmed that an award is a debt as contemplated in the Prescription Act 68 of 1969, which prescribes after three years, and that the Labour Court has no equitable jurisdiction to resuscitate such a claim.

Practice and Procedure

The Labour Court granted an application to strike out certain paragraphs of an employee's replying affidavit in *De Beer v Minister of Safety & Security & another* (at 2506) on the basis that they raised new issues and were irrelevant, but allowed statements that were in direct response to the employer's answering affidavit.