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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

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HIGHLIGHTS FROM THE INDUSTRIAL LAW REPORTS

Transfer of a Business as a Going Concern

The issue of second generation contracting-out transactions, and whether and when such transactions fall within the purview of s 197 of the LRA 1995, would seem to have been finally resolved by the Constitutional Court decision in *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* (at 2861). The court overruled the recent judgment of the Supreme Court of Appeal (reported at (2011) 32 *ILJ* 87 (SCA)), and reaffirmed the earlier decision of the Labour Appeal Court in which the LAC found that s 197 requires a purposive interpretation in order to protect employees from unscrupulous employers. The CC found that the SCA had erred by singling out the word 'by' in the definition of a 'transfer', and that the 'generation' of the transfer does not matter so long as there has been a transfer of a business as a going concern from an 'old employer' to a 'new employer'. The minority court (five members) found that there was not enough evidence on the papers to show that a further transfer of a business as a going concern had in fact occurred, and that the matter should therefore be remitted to the Labour Court for reconsideration in the light of the CC's comments. The majority court (six members) found that it was not necessary that a further transfer should already have taken place before the employees were entitled to relief, and that there was no need to refer the matter back. The appeal therefore succeeded.

Protected Strike Action — The Need to Give Strike Notice

On appeal to the *Supreme Court of Appeal in Equity Aviation Services (Pty) Ltd v SA Transport & Allied Workers Union & others* (at 2894) the question before the court was whether, where a majority trade union has already given notice of proposed strike action and referred the matter for conciliation, it is necessary for employees who are not union members to give separate notice of their intention to strike. The Labour Appeal Court had held that such notice was not necessary (see (2009) 30 *ILJ* 1997 (LAC)), and that all employees in the bargaining unit were at liberty to take part. The SCA disagreed. The court found that the purpose of the requirement to give notice of strike action contained in s 64(1)(*b*) of the LRA 1995 is to warn the employer of the power play to follow, to enable it to make informed decisions. Failure by non-union employees to give notice would lead to chaotic collective bargaining.

In *Plastics Convertors Association of SA v Association of Electric Cable Manufacturers of SA & others* (at 3007) the Labour Court held that in the case of an industry-wide protected strike it was not necessary for the employees of employers who were not parties to the relevant bargaining council to refer individual disputes for conciliation before embarking on strike action. Although not parties the employers still fell under the jurisdiction of the council, and notice to the bargaining council itself was sufficient.

Essential Services and the Right to Strike

In *Eskom Holdings Ltd v National Union of Mineworkers & others* (Essential Services Committee intervening) (at 2904) the Supreme Court of Appeal had to consider whether, where the employer and union parties in an undertaking providing essential services had failed to agree on the terms of a minimum services agreement, the resultant dispute was one which could be referred to compulsory arbitration in terms of s 74 of the LRA 1995. The Labour Court and the Labour Appeal Court had formed differing views on the matter. On appeal the essential services committee (ESC) established in accordance with s 70 of the LRA was granted leave to intervene as an interested party. The court accepted the ESC's contention that, as a minimum services agreement dealt with what was an essential service and whether any employee or category of employees should be regarded as being engaged in an essential service, it was the function of the ESC, not the CCMA or a bargaining council, to determine such disputes in terms of s 73. This, said the court, did no violence to the wording of s 73 and placed the least limitation on the fundamental right to strike.

The Test for Leave to Appeal

The Supreme Court of Appeal refused to grant leave to appeal in *Food & Allied Workers Union on behalf of Mbatha & others v Pioneer Foods (Pty) Ltd t/a Sasko Milling & Baking & others* (at 2916), a case in

which both the Labour Court and the Labour Appeal Court had already refused leave to appeal against their decisions. The SCA found that the test for leave to appeal laid down in *National Union of Metalworkers of SA & others v Fry's Metals (Pty) Ltd* (2005) 26 *ILJ* 698 (SCA) had to be rigorously applied. The LRA 1995 intended that labour disputes be resolved speedily and created specialist tribunals to that end. The SCA would not lightly interfere with the decisions of those tribunals.

The Admission of Evidence and the Right to Privacy

In *Davids and Special Investigating Unit* (at 3048) the employer party sought in CCMA proceedings to lead evidence obtained in violation of the employee's constitutional right to privacy in order to prove that his dismissal for incompatibility had been fair. The commissioner noted that in such cases the arbitrator retained a discretion to admit or exclude improperly obtained evidence, and enumerated the factors to be taken into account. He also considered the impact of the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 on the admission of such evidence and noted that the requirements of the Act had not been complied with. He found that this factor did not in itself render the evidence inadmissible, but that the employee was being asked to raise a defence against the allegations against him on assumptions that the employer could not prove or elucidate. On this basis the evidence was excluded.

SA Police Service — Regulations

In *Clarence v National Commissioner of the SA Police Service* (at 2927) the Labour Appeal Court considered the correct interpretation of the SA Police Service Discipline Regulations, with particular reference to the deemed discharge of a police officer for the commission of a crime; in the case before the court, the crime of murder. In the matter in question the officer had not been criminally prosecuted and had raised a private defence, as he had believed his and his other officers' lives to be in danger and had shot the victim in self-defence. The Labour Court had set aside an arbitration award reinstating the officer, finding that the arbitrator did not understand the principles of self-defence. The LAC considered the regulations and the test for private defence and found that the SAPS had not discharged the onus on it to prove, on a balance of probabilities, that the officer had committed the offence of murder. The appeal was upheld.

Dismissal and Reinstatement — Strike Context

The employees in *Edelweiss Glass & Aluminium (Pty) Ltd v National Union of Metalworkers of SA & others* (at 2939) embarked on a protected strike in support of their union's demand for organizational rights, and later pressed a demand for a thirteenth cheque. The Labour Court had found that this later demand had not rendered the strike unprotected, and that their dismissal for striking was automatically unfair. On appeal the Labour Appeal Court agreed, finding that holding the union strictly to the demands which it had articulated during conciliation would defeat the purpose of collective bargaining, and that it was permissible for it to modify the demands and views which it had previously expressed. The appeal was dismissed.

In *SA Municipal Workers Union on behalf of Abrahams & others v City of Cape Town & others* (at 3018), where members of the city's law enforcement department had taken part in a mass strike and an unlawful traffic blockade, the Labour Court found that, where the employees had been given the chance to advise the employer of their non-involvement, but had not done so, and where they had a duty to assist management to identify guilty workers and had failed to do so, the employer was justified in dismissing workers en masse on the basis of collective misconduct or common purpose.

Dismissal for Insubordination

The arbitrator in *SA Chemical Workers Union on behalf of Theka & others and Crystal Pack (Pty) Ltd* (at 3077) found that employees who refused to follow their employer's instruction to implement a new shift system did not have a contractual right to a particular shift system. The change was merely a change to work practice and their refusal amounted to insubordination.

Unfair Retrenchment

The Labour Court held in *Metshe v Public & Allied Workers Union of SA* (at 2984) that an employer may not, having suspended an employee for misconduct, then purport to retrench him instead of taking disciplinary action against him for misconduct. The employer must prove that the decision to retrench was genuine, and not merely a sham.

Repudiation of Contract of Employment

In *Nyathi v Special Investigating Unit* (at 2991) the respondent employer contended that, where the employee had breached a material term of her contract of employment, it was entitled to accept the repudiation and to terminate the contract lawfully at common law. The Labour Court accepted that the employment relationship has a contractual character, and that in principle an employer has a right contractually to terminate a contract of employment without any disciplinary hearing. Whether the termination would be fair was an entirely different question. The court dismissed the employee's application to interdict the employer from terminating the contract lawfully, but pointed out that this did not prevent her from exercising any rights she might have under the law for unfair dismissal.
In *Kauleza & others and Bay United Football Club* (at 3091) football players on fixed-term contracts with a football club, who had been advised that they would not be selected to play in the coming season, and whose salaries had not been paid for one month, claimed in private arbitration proceedings that this amounted to a breach of their contracts of employment which entitled them to accept the repudiation, cancel the contracts and claim payment of their salaries for the remaining period of their employment. The arbitrating chairman emphasized the distinction between an ordinary workplace and a football environment, but agreed that the club's action amounted to a breach which entitled the players to cancel the contract and claim damages. Damages were awarded, but not for the full amount claimed.

Employment Relationship

The Labour Court reviewed the various tests that have been employed by the courts to determine the existence of an employment relationship in *J & J Freeze Trust v Statutory Council for the Squid & Related Fisheries of SA & others* (at 2966), and found on the facts before it that the skipper of a fishing vessel was an employee, and so fell within the jurisdiction of the relevant statutory council. The fact that it was a general practice in the fishing industry to regard skippers as independent contractors did not give the practice legal force, and each case had to be evaluated on its merits.

Automatically Unfair Dismissal

The Labour Court considered in Solidarity on behalf of Wehncke v Surf4-Cars (Pty) Ltd (at 3037) when an employee's dismissal after refusing to accept his employer's demands in a matter of mutual interest would be considered to be 'automatically unfair' within the meaning of s 187(1)(c) of the LRA 1995. Applying the interpretation of s 187(1)(c) approved in National Union of Metalworkers of SA & others v Fry's Metals (Pty) Ltd (2005) 26 *ILJ* 689 (SCA) the court found that only conditional dismissals fell within that section. Dismissals that were not reversible on acceptance of the demand could not have as their reason 'to compel the employee to accept' the demand, and were therefore not automatically unfair.

Residual Unfair Labour Practice — Benefits

At arbitration in National Union of Mineworkers on behalf of Kaekae & another and Impala Platinum Ltd (at 3065) the CCMA commissioner dismissed the employees' claim for compensation for loss of benefits in terms of s 186(2)(a) of the LRA 1995. Employees who had been appointed as full-time trade union representatives on a higher salary scale had been returned to their old positions on a lower scale at the end of their term of office. The commissioner found that their salary while acting comprised remuneration and was not a 'benefit' for the purposes of s 186(2)(a).

Dismissal or Retirement?

The employee party in Robertson and Cummins SA (at 3070) claimed that he been unfairly dismissed on reaching retirement age because he had a reasonable expectation that his employment would be extended. The arbitrator reviewed case law on the issue and found that the employee had shown no such expectation. Further, on reaching retirement age he had not been dismissed. His contract had simply lapsed.

The Review of Arbitration Awards

The Labour Court reviewed and set aside a bargaining council award in Madibeng Local Municipality v SA Local Government Bargaining Council (North West Division) & others (at 2978), finding that the arbitrator had not applied his mind and that his conclusions were not rationally connected to the facts before him. In addition to his failure to give reasons for his findings, he had reinstated the employee, although she only sought compensation, and had granted her reimbursement, a remedy not competent in terms of the LRA.

Employers' Organization — Cancellation of Registration

The Labour Court refused in Cape Agri Employers' Organization v Registrar of Labour Relations (at 2952) to grant an urgent interim order suspending the cancellation of the applicant's registration by the Registrar of Labour Relations pending the outcome of its appeal against that decision. The court found that the organization had breached its own constitution by permitting labour consultants to become members, that it had not shown that it would suffer irreparable harm, and that the courts should not unduly interfere with the exercise of the registrar's powers.

Intervention in Uncompleted Demarcation Proceedings

In Workforce Group (Pty) Ltd v National Textile Bargaining Council & another (at 3042) the bargaining council had referred a demarcation dispute to CCMA arbitration, to determine whether the applicant employer fell within the textile sector. When the employer objected that the arbitrator lacked jurisdiction to hear the matter, that objection was overruled. The employer then applied to review that ruling, and further sought an urgent order staying the demarcation proceedings until the review had been heard. The Labour Court refused the application on the ground that it was not urgent, that the employer had other remedies available to it, and that the court should only intervene in uncompleted demarcation proceedings in exceptional circumstances.

Adoption of High Court Rules in the Labour Court

In Labour Court proceedings in Chemical Energy Paper Printing Wood & Allied Workers Union & others v Express Payroll CC (at 2959) the respondents called upon the attorneys for the applicant union to prove that they had authority to act on behalf of its employees, which the attorneys considered to be unnecessary. As the Labour Court Rules were silent on the matter the Labour Court found it appropriate to adopt the relevant High Court Rules regarding the proof of disputed authority, and that the union and its attorneys were required to provide proof of authority.

Quote of the Month:

Lallie AJ in Madibeng Local Municipality v SA Local Government Bargaining Council (North West Division) & others (2011) 32 *ILJ* 2978 (LC), on setting aside an arbitration award:
'In this review application the arbitrator's conclusion is not rationally connected to his reason taking into account the material before him. Instead the arbitration award is awash with illustrations of the arbitrator's failure to carry out his mandate.'