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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

Retrenchment — the Right to Consultation

The Labour Appeal Court has in *Aunde SA (Pty) Ltd v National Union of Metalworkers of SA* (at 2617) upheld an earlier judgment of the Labour Court (reported at (2010) 31 *ILJ* 133 (LC)) in which that court considered whether an employer remained under a duty to consult with a union that it no longer recognized before retrenching its members in accordance with a recognition agreement which the employer had just concluded with a new majority union. The court below had noted that the new recognition agreement contained no provision regulating consultation prior to retrenchment, and held that in the absence of such a provision the employer was obliged to consult with the non-recognized union and any other party identified in s 189(1) of the Labour Relations Act 66 of 1995. On appeal the LAC upheld the Labour Court's finding in this respect. The court further found that, in any event, the recognition agreement between the old union and the employer was still in existence and that the employer was obliged to consult in terms of that agreement.

Unfair Discrimination and Automatically Unfair Dismissal

In *Department of Correctional Services & another v Police & Prisons Civil Rights Union & others* (at 2629) male prison officers had been dismissed after refusing to remove their dreadlocks, which contravened the employer's dress code, and claimed that they were the victims of unfair discrimination on the grounds of religion, cultural practice and gender. The Labour Court found that they had failed to establish discrimination on the grounds of either religion or cultural practice, but that as female officers were permitted to wear dreadlocks there had been gender discrimination, and on this basis their dismissal had been automatically unfair. On appeal the Labour Appeal Court held that the court below had erred in finding that there had been no discrimination on the grounds of religion or cultural practice. It found that the employer's dress code directly discriminated against the employees in this respect. They were treated less favourably than, not only their female colleagues, but also those on whom the code imposed no religious or cultural disadvantage. In the course of its enquiry the court conducted a detailed investigation into the circumstances in which discrimination, once proved, would or would not be considered unfair, and the criteria for making such an assessment.
In another case involving an alleged automatically unfair dismissal, *Mouton v Boy Burger (Edms) Bpk* (at 2703), the Labour Court noted that, although s 187(1) of the LRA imposes an evidential burden on the employee to show a credible possibility that his dismissal was automatically unfair, the overall onus still rests on the employer to show that the dismissal was fair. The court therefore refused the employer's application for absolution from the instance in the case before it. Similarly, in *National Union of Mineworkers & another v Civil & General Contractors CC & another* (at 2709), in which the employee alleged that he had been dismissed for refusing to resign from his union, the Labour Court noted the evidential burden which rested on the employee, and found that his version of events was not supported by the evidence, and that he had not shown a credible possibility that his dismissal was automatically unfair.

Dismissal of Suspected Illegal Immigrant

In *Dunwell Property Services CC v Sibande & others* (at 2652) the Labour Appeal Court upheld an earlier finding by the Labour Court that the dismissal of an employee on the ground that the employer suspected him to be an illegal immigrant was substantively and procedurally unfair. The court found the employer's assertion that the employee was using a fraudulent identity document to be an unproved allegation which was factually incorrect. In the absence of evidence that the employee had been declared a prohibited

immigrant in terms of the Aliens Control Act 96 of 1991, which applied at the time, the employer had failed to show that the dismissal was for a fair and valid reason.
The employee party in *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 2756) was a foreign national who, having failed to obtain a valid work permit as requested by her employer, was subject to disciplinary proceedings and was dismissed. The CCMA ruled that it had jurisdiction to hear the resultant dispute. On review the Labour Court aligned itself with earlier case law on the issue, and found that the employee, although an illegal immigrant, still enjoyed the status of an employee in terms of the LRA, and that the CCMA had jurisdiction to entertain the dispute referred to it. The court refused an order for costs against the CCMA, and granted the CCMA its own costs in having to defend the application.

Powers of the Labour Court inT ax Matters

The Labour Court was asked in *LSRC & Associates v Blom* (at 2685) to determine which of two parties was liable to pay income tax on an amount which had been agreed in a settlement agreement, which had then been certified in terms of s 142A of the LRA. The court found that it had no power to decide the tax obligations of the parties, which fell to be determined in terms of tax legislation.

Interpretation of Settlement Agreements

After examining the provisions of a settlement agreement reached between the parties in *Ngwathe Local Municipality v SA Local Government Bargaining Council & others* (at 2724), the Labour Court held that the agreement addressed the cause of the dispute, namely, the introduction of a new shift system, and that the dispute had been finally put to rest. The bargaining council's finding that the settlement only related to certain disciplinary proceedings, and that it still had jurisdiction to consider the issue of the new shift system, was therefore set aside. The parties in *Goci and Metropolitan Health Corporate (Pty) Ltd* (at 2797) had entered into a settlement agreement providing for the re-employment of the employee, but in another position. The employee challenged the terms of the agreement, refused to carry out his duties in the new position, and was dismissed. The CCMA commissioner upheld his dismissal for insubordination. Any dispute as to the interpretation of the agreement should have been dealt with through the appropriate channels, not through refusing to carry out instructions.
In *Maasz and Fidelity Security Services (Pty) Ltd* (at 2825) the applicant referred to arbitration a dispute variously described as concerning severance pay, constructive dismissal or an unfair labour practice. It appeared in evidence that before referral the parties had entered into a settlement agreement, but that the employee was not satisfied with the manner in which it was implemented. The CCMA commissioner found that he had no jurisdiction to arbitrate the dispute, which essentially concerned the interpretation and application of the agreement.

Fixed-term Contracts

In *Pik-It-Up Johannesburg (Pty) Ltd v SA Local Government Bargaining Council & others* (at 2728) the applicant employee claimed that she had a reasonable expectation that her five-year contract of employment would be renewed on expiry, and that she had been unfairly dismissed. The Labour Court first enumerated in detail the factors relevant to such an enquiry, and noted that the totality of the evidence and surrounding circumstances had to be considered. Applying these factors to the dispute before it the court found that the employee had discharged the onus of proving a reasonable expectation of renewal, and that she had been unfairly dismissed. *In Overberg Fishing (Pty) Ltd v Docampo* (at 2835) the Labour Court of Namibia considered the principles applicable to fixed term contracts and their termination by effluxion of time, which the court found still formed part of the law in that country. It was therefore crucial first to determine whether the contract was for a fixed term or was indefinite in order to determine whether there had been a dismissal and, if so, whether the dismissal was unfair.

Participationin Protected Strike Action

In *AMCU on behalf of Zulu and Mashala Resources* (at 2778) the commissioner accepted that participation in protected strike action was not confined to the members of the union which called the strike, but included all employees of the affected employer, including non-members.

Unfair Labour Practice relating to Benefits

The CCMA commissioner in *Abrahams and Lukhanyo Clinic CC t/a Kensington Treatment Centre* (at 2773) found that an employer's undertaking to make a discretionary or ex gratia payment, even if calculated as a percentage of salary, did constitute a benefit for the purpose of s 186(2)(*a*) of the LRA. However, on the facts he found that the employee had not discharged the onus to show that the employer had indeed undertaken to make such a payment.

Basic Conditions of Employment Act 75 of 1997

The applicant employer in *Telesure Group Services (Pty) Ltd v Naidoo* (at 2769) brought a claim in terms of s 77 of the BCEA 1997 for the recovery of salary payments which it had erroneously continued to make to the respondent after his dismissal. The Labour Court found that the claim was not related to the termination of employment, but was a claim for unjustified enrichment, which did not fall under s 77(3) of the Act. The court therefore had no jurisdiction to entertain the claim.

Employment Relationship

The applicant's referral of an unfair dismissal dispute to the CCMA was dismissed with punitive costs in *Maunye and Mutual Construction Company Group of Companies (Pty) Ltd* (at 2829) when it was discovered that he had in fact never been employed by the respondent, but had simply enrolled himself as a trainee.

Derivative Misconduct

The commissioner in *Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Hlebela and Lonmin Precious Metals Refinery* (at 2782) considered whether the wilful non-disclosure by an employee of the knowledge of a fellow employee's misconduct could itself constitute derivative misconduct warranting dismissal. The employee concerned was suspected of being implicated in the pilfering of platinum from the employer's mine, and a 'life style audit' showed that he was living at a level that could not be supported by his salary. After considering the circumstantial evidence presented the commissioner found that the employee must have known of the wrong doing of other employees, that he had failed without justification to disclose that knowledge, and that his dismissal on the basis of derivative misconduct was fair.

IT Misconduct — Installing Spyware

Govender and Comair Ltd (at 2809) concerned the dismissal of a technician in an airline's internet technology department for allegedly installing spyware onto the employer's computers. The case required the testimony of a computer forensic investigator who, via a complex chain of technical evidence, was able to link the installation of the spyware to the technician, who denied any involvement. The CCMA commissioner accepted the evidence against the employee as overwhelming and found his dismissal to have been justified.

Remedies for Unfair Dismissal

The Labour Court noted in *Baba v General Public Service Sectoral Bargaining Council & others* (at 2669) that the remedies preferred by the legislature for unfair dismissal are reinstatement or re-employment, and that compensation is appropriate only where the exceptions specified in s 193(2) of the LRA have been proved. The court set aside an award in which the arbitrator had granted compensation rather than reinstatement in a case where there had been a substantial delay in prosecuting the dispute, finding that she had failed to exercise her discretion judicially.

Disciplinary Code and Procedure

In *SA Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining Council & others* (at 2738) the chairperson of a disciplinary enquiry had recommended a penalty of suspended dismissal, which the municipal employer had changed to one of summary dismissal. At arbitration the dismissal was held to be fair. On review the Labour Court noted that the disciplinary action had been taken in accordance with a collective agreement that required the chairperson to make findings of fact and to determine the appropriate sanction. The court found that in deciding to perform a function that had been entrusted to the chairperson the employer had breached the collective agreement and its own disciplinary code, and that it could not reclaim powers that it had relinquished in terms of a binding agreement. The dismissal was unfair. The municipal employer in *SA Municipal Workers Union on behalf of Matola v Mbombela Municipality* (at 2748) did not have its own disciplinary code, and its standard contract of employment incorporated the provisions of the SALGBC disciplinary code which, inter alia, provided that the presiding officer and employer representative at disciplinary hearings should not be legal practitioners. A municipal employee subject to disciplinary proceedings successfully applied to the Labour Court for an urgent interdict to prevent the employer from continuing with the enquiry until it complied with the code incorporated in the employee's contract of employment. The court found that the employee was essentially seeking the specific performance of his contractual rights, and that it was difficult to substitute any alternative remedy.

Practice and Procedure

The Labour Appeal Court restated the general principles applicable to the grant or refusal of condonation for a party's failure to comply with a court directive in *Novo Norsdisk (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 2663). The LAC upheld the Labour Court's refusal to condone the late filing of a reconstructed record where the defaulting party had failed to show a reasonable and acceptable explanation for its default, and had little prospect of success in the action.
In *Food & Allied Workers Union & others v Key Spirit Trading 193 CC t/a Jimmy's Superspar* (at 2677) the Labour Court had granted a final interdict declaring a certain strike to be unprotected. In later proceedings arising from the dismissal of the employees involved in the strike, the Labour Court found that the employees were estopped from leading evidence to show that the strike was in fact lawful, as the matter was res judicata. In *Moshela v Commission for Conciliation, Mediation & Arbitration & others* (at 2692) the Labour Court considered the test to be applied by arbitrators when deciding whether to grant a postponement of proceedings and found that, as there was no evidence that the applicant would suffer prejudice if it were not granted, the commissioner had been correct to refuse a postponement. However, the court found that an award of attorney and client costs against the applicant was not warranted, and set that award aside. *National Union of Mineworkers on behalf of Gabela v Commission for Conciliation, Mediation & Arbitration & others* (at 2714) involved an application to the CCMA concerning an alleged constructive dismissal, which was dismissed when the employee and her union failed to appear at the hearing. The employee applied to rescind that decision, claiming that she had not received notice of the hearing, and when the application was refused took the matter on review. The Labour Court noted that a CCMA fax transmission slip, while not necessarily proof that the notice had

been received by the employee and her union, was prima facie evidence of service, and called for other evidence to rebut the inference that it had been received. A mere denial with no other explanation was not sufficient, and the commissioner's conclusion that notice had been received was reasonable, and not subject to review.