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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

Minister's Vicarious Liability for the Delictual Conduct of Police Officers

The Constitutional Court has now in *F v Minister of Safety & Security & another* (at 93) overruled the earlier judgment of the Supreme Court of Appeal (reported in (2011) 32 *ILJ* 1856 (SCA)), in which that court by a three to two majority held the Minister of Safety & Security not to be vicariously liable for the actions of a police officer who raped a young girl while off duty but on standby. The CC traced the evolution of the test for vicarious liability in so-called 'deviation' cases to accord with the requirements of the Bill of Rights, and applied the two-stage test laid down earlier in *N K v Minister of Safety & Security* (2005) 26 *ILJ* 1205(CC) to assess whether the complainant had shown a sufficiently close link between the policeman's conduct and his employment to render the employer liable. A factor which weighed heavily with the court was the constitutional mandate given to the police service to serve and protect the public, and the element of trust consequently reposed in it by the public, including the young girl. In its majority judgment seven members of the court found the minister to be vicariously liable for the policeman's actions. One member supported the majority judgment, but based his decision on the direct delictual liability of the state for the wrongful acts of organs of state and their functionaries. Two members found there was not a sufficient connection between the policeman's actions and his employment to render the employer liable.

Interpretation of Collective Agreements

The parties in *BMW SA (Pty) Ltd v National Union of Metalworkers of SA on behalf of Members* (at 140) entered into a collective agreement which, inter alia, required the union party to follow a prescribed procedure, involving facilitation, in order to resolve a dispute of interest arising from its demand for certain transport allowances. When the matter came before the Labour Appeal Court the court was required to decide whether, if the parties failed to reach agreement on the demand, the union then had a choice either to follow the pre-strike procedure prescribed in the agreement or to follow the statutory procedure laid down in s 64(1) of the Labour Relations Act 66 of 1995. One member of the court found that this was so, and that the union had the right to strike after complying with s 64(1). The majority court found that the union was still required to follow the procedure laid down in the agreement. However, as the employer had shown no genuine desire to take part in the prescribed facilitation, the court held that the union was thereafter free to follow the statutory procedures.

In *eThekwini Municipality (Health Department) v Independent Municipal & Allied Trade Union on behalf of Foster & others* (at 152) the parties entered into a collective agreement regulating the placement of employees following a restructuring exercise. The agreement set up a 'placement committee' to attempt to reach consensus on placements and made provision for grievances to be referred to arbitration should the parties fail to agree on the placements. The Labour Appeal Court held that employees were bound by the decisions taken by the committee by consensus, and had no individual recourse to arbitration. A collective agreement should be interpreted so as to promote collective bargaining and to ensure effective and sound industrial relations. To permit individual employees to refer all their grievances to arbitration would lead to a multiplicity of arbitrations and would not accord with the principle of collective bargaining.

Reinstatement After Strike Dismissal

In *Mediterranean Textile Mills (Pty) Ltd v SA Clothing & Textile Workers Union & others* (at 160) the Labour Appeal Court partially overruled an earlier decision of the Labour Court, in which that court had ordered the full retrospective reinstatement of employees who had been summarily dismissed on one and a half hours' notice after embarking on an unprotected strike. On appeal the employer admitted that it had acted with undue haste, but argued that it was not 'reasonably practical' to reinstate the employees due to its parlous financial position. The LAC found that the overriding consideration should be that of

fairness between the parties, and that it was important for the employer in such a case to lead evidence to show that reinstatement was not reasonably practical, which it had not done in the court below. The court concluded that the primary statutory remedy of reinstatement had correctly been awarded, but limited the amount of backpay awarded in order to avoid imposing an unjust financial burden on the employer.

Fixed-term Contracts — Expectation of Renewal

The employee party in *University of Pretoria v Commission for Conciliation, Mediation & Arbitration & others* (at 183) claimed that, after having been employed in terms of seven successive fixed-term contracts she had a reasonable expectation that she would be employed on a permanent basis, and that her employer's offer of only a further fixed-term contract constituted a dismissal in terms of s 186(1)(*b*) of the LRA. The Labour Appeal Court disagreed. The court found that there was a distinction between a fixed-term contract and a permanent contract which had a clear rationale. The express words of s 186(1)(*b*) covered only a restrictive set of circumstances, and the CCMA and the court below had erred by concluding otherwise.

Employment Relationship

The Labour Court was required in *City of Tshwane Metropolitan Municipality v SA Local Government Bargaining Council & others* (at 191) to consider the basis on which the employment relationship ultimately rests, having regard to the definition of 'employee' contained in s 213 of the LRA and to the reference in s 189(1)(*a)* to the termination of a 'contract of employment'. The court found that a contract of employment was not a prerequisite for an employment relationship to arise, and recommended that the term 'contract of employment' be given a wide interpretation to encompass an 'employment relationship' in regard to s 189(1)(*a*). Not to do so would deprive a person who qualified as an employee, but who could not establish the existence of a contract of employment, of protection against unfair dismissal.

Termination of Employment Ex Lege

Department of Correctional Services v General Public Service Sectoral Bargaining Council & others (at 216) concerned an application to the Labour Court to review a bargaining council award in which the arbitrator had found that a public service employee, who had been absent for more than 30 days without permission, allegedly through ill health, had been unfairly dismissed. The applicant department argued that his employment had been terminated ex lege in accordance with the terms of a bargaining council resolution which applied to that department and which provided for deemed dismissal after 30 days' absence without permission or without notifying the employer; and that he had therefore not been dismissed in terms of the LRA. The court compared the wording of the resolution with that of other statutory provisions that had triggered the termination of employment ex lege of absent public servants, and had reference to relevant jurisprudence on the issue. The court found that in the case before it the resolution required that the employee be absent without notifying the employer. As the employee had notified the employer of his absence the resolution did not apply. The arbitrator's award was upheld.

Automatically Unfair Dismissal

In *Evan Gordon Enterprises (Pty) Ltd v Phetla NO & others* (at 229) the Labour Court reviewed and set aside the award in an arbitration in which the employee party had asserted that the true reason for his dismissal was not on account of his misconduct but because he had joined a trade union. The arbitrator had preferred the employee's version of events and had determined the dismissal to be unfair on that basis. The court found that the arbitrator should have realized that he was dealing with an automatically unfair dismissal, and should have advised the employee that if he relied on that reason for dismissal then

he would have no jurisdiction to arbitrate the dispute unless both parties consented to jurisdiction in terms of s 141(1) of the LRA. In the circumstances the arbitrator lacked jurisdiction to arbitrate.

Similarly, in *Mouton v Boy Burger (Edms) Bpk* (at 249) a white farm-worker claimed before the Labour Court that he had been dismissed because he had married a coloured woman, and for his trade union activities, and that his dismissal was therefore automatically unfair. The court refused at the close of the employee's case to grant the employer absolution from the instance in the proceedings for reasons already reported in *Mouton v Boy Burger (Edms) Bpk* (2011) 32 *ILJ* 2703 (LC). The court then applied the two-step test endorsed by the LAC in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others* (2002) 23 *ILJ* 863 (LAC) to determine the true reason for the dismissal. If it was shown that the employee would have been dismissed even if he had not married a coloured woman, or taken part in union activities, then the dismissal was not automatically unfair. Having considered the evidence the court found that the dismissal did not fall within either s 187(1)(*d*) or s 187(1)(*f*) of the LRA, and that it was neither automatically unfair nor unfair.

The Review of Private Arbitration Awards

In *SA Commercial Catering & Allied Workers Union & others v Pick 'n Pay Retailers (Pty) Ltd & others* (at 279) the Labour Court confirmed that the grounds on which a private arbitration award can be reviewed are confined to those set out in s 33(1)(*a*) and (*b*) of the Arbitration Act 42 of 1965. The applicants claimed that a private arbitrator, charged with determining whether certain agreements had been lawfully terminated, who had failed to determine the validity of the termination of a supplementary agreement as a separate issue, had committed a latent gross irregularity. The court considered the test to be applied for a review in the case of a 'non-determination', and confirmed that the failure to determine an issue could potentially constitute a latent gross irregularity. However, the court found that the arbitrator's determination had been wide enough to encompass a determination that the supplementary agreement had been lawfully terminated. Whether his answer was right or wrong was immaterial. He did not commit a gross irregularity.

Mootness

The Labour Appeal Court found in *Multichoice Africa (Pty) Ltd v Broadcasting Electronic Media & Allied Workers Union & others* (at 177) that an appeal from a status quo order of the Labour Court, directing an employer to restore an earlier shift system for a period of 30 days, had become moot after a lapse of six years, and that there was no live issue before the court which called for the court to determine an appeal.

Practice and Procedure

The Labour Court reviewed and set aside the ruling of a CCMA commissioner in *Kgobokoe v Commission for Conciliation, Mediation & Arbitration & others* (at 235) where the commissioner had refused to grant an applicant employee a postponement to afford the employer party a chance to reduce an offer of settlement to writing, and had insisted that the employee withdraw his claim in the light of the offer of settlement. The court held that the commissioner's actions were not rational but ultra vires and grossly irregular. The court further found that the applicant had not signed the notice of withdrawal voluntarily, but under pressure, and that he was entitled to apply for the reinstatement of his claim once it became clear that the proposed settlement had fallen away. A firm principle had been established that a withdrawal of a matter might itself be withdrawn, save where it was shown that the respondent would be prejudiced by the reinstatement of the claim.

The applicant in *Technikon Pretoria (now Tshwane University of Technology) v Nel NO & others* (at 293) applied to have an arbitration award made an order of court, but delayed in enforcing the application. When the matter came before the Labour Court the respondent alleged in its heads of argument that the debt had prescribed. After considering the provisions of s 17 of the Prescription Act 68

of 1969 the court found that a party wishing to raise prescription as a defence should do so in an affidavit or by way of a special plea, and not by way of exception. The court found that it had insufficient facts before it to determine whether the claim had prescribed and that the point was not properly before the court.