# INDUSTRIAL LAW JOURNAL MONTHLY PREVIEW

ISSUE 33

FEBRUARY 2012

**Dear *Industrial Law Journal* Subscriber,**

We take pleasure in presenting the January 2012 issue of the monthly *Industrial Law Journal Preview*, authored by the editors of the *ILJ*: C Cooper, A Landman, C Vosloo and J Wilson. Below is a message from our marketing department. Our apologies for any inconvenience caused.

**Please note: This newsletter serves as a preview of the printed and electronic *Industrial Law Journal*. At the time of its dissemination, the full-length cases and determinations are still being prepared for publication in the *Industrial Law Journal*. The material mentioned in this newsletter only becomes available to subscribers when the *Industrial Law Journal* is published.**

**WE WELCOME YOUR FEEDBACK**

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

## Powers and Duties of the Labour Appeal Court

The Supreme Court of Appeal had occasion in *Visser v Mopani District Municipality & others* (at 321) to consider whether the Labour Appeal Court had power, when adjudicating an appeal, to take into account events which occurred after the award or judgment which was the subject of the appeal, in order to craft what it considered to be a more appropriate remedy in the circumstances. In the case before it the matter had taken six years to come before the LAC, which had considered that in view of the delay, compensation would be a more appropriate remedy than reinstatement as originally ordered. On further appeal the SCA endorsed the 2010 finding by the Constitutional Court in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others* (2010) 31 *ILJ* 273 (CC) that systemic delays, while deplorable, did not justify the development of a constitutional duty to enquire into post-judgment facts on appeal or review in order to fashion an equitable remedy. The LAC remained bound to the same test in relation to the remedy as to the merits of the appeal before it, and it had misconceived the nature of its functions by going beyond that.

## Dismissal for Sexual Harassment

The Labour Appeal Court in *Gaga v Anglo Platinum Ltd & others* (at 329) undertook a detailed review of the working environment within which alleged incidents of the sexual harassment of a junior employee by her manager had taken place, and upheld the finding by the court below that such misconduct warranted the penalty of dismissal. The court considered the factors to be taken into account at arbitration when determining whether the offence had been proved and whether dismissal was appropriate, and noted that these would include a consideration of similar fact evidence, to show a pattern of such behaviour or of serial misconduct by the harasser.

The Labour Court refused in *Standerton Mills (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 485) to review and set aside a CCMA award ordering the reinstatement of an employee who had been dismissed for sexual harassment. The commissioner had found that the complainant's evidence lacked credibility, and the court was reluctant to upset such a finding unless it could be shown to be so out of kilter that it constituted a gross irregularity.

## The Interpretation of Collective Agreements

In *SA Municipal Workers Union v SA Local Government Bargaining Council & others* (at 353) the Labour Appeal Court considered the factors which should be taken into account when interpreting the wording of a collective agreement in order to calculate the annual leave due to shift workers who did not work a normal five-or six-day week pattern. The court upheld the findings of the arbitrator to whom the dispute had initially been referred. The court held that a collective agreement was unlike an ordinary contract, and that the primary objects of the LRA 1995 were best served by adopting a purposive approach to its interpretation. The arbitrator, it found, was entitled to resort to considerations of fairness and equity when interpreting the agreement. Similarly, in *SA Municipal Workers Union on behalf of Hendricks and City of Cape Town* (at 538) the arbitrator considered the principles for the interpretation of collective agreements and adopted a purposive interpretation of the words used which would best promote the aims and objectives of labour legislation. He noted that a collective agreement is not merely a contract but a social and economic pact between the parties.

The commissioner in *SA Commercial Catering & Allied Workers Union and Southern Sun Hotel Interests (Pty) Ltd* (at 508), also interpreting a collective agreement, ruled that unless ambiguous, words must be given their plain, ordinary and popular meaning, but he admitted extrinsic evidence to show the intention of the parties.

**Contract Law**

In *Solidarity & others v Eskom Holdings Ltd* (at 464), in which the employees claimed that their employer had agreed that they could take early retirement without loss of benefits, the Labour Court was required to decide whether consensus had in fact been reached on the matter, and whether those representing the employer had actual authority. Applying the principles laid down in *Royal British Bank v Turquand* the court held that the employees could rely on the employer's manifestation of assent, and that the employer was bound by the claimed agreement.

**Employment Equity Act 55 of 1998**

The Labour Court held in *Masango v Liberty Group Ltd* (at 414) that there is no specified time-limit within which an unfair discrimination dispute brought in terms of the EEA 1998 must be referred for adjudication or arbitration after attempted conciliation has failed. The referral must be within a reasonable time. The provisions of s 191 of the LRA 1995 do not apply to such disputes. In *Moyo v Execujet* (at 429), in which the parties had agreed to refer an unfair discrimination dispute to arbitration, the Labour Court found that it had no power to abrogate such an agreement. The agreement could only be terminated by the written consent of both parties in terms of s 141(3) of the LRA 1995.

**Constructive Dismissal**

The Labour Court undertook a detailed review in both *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others* (at 363) and *SA Police Service v Safety & Security Sectoral Bargaining Council & others* (at 453) of the case law on the issue of constructive dismissal, and of the three requirements which have to be proved in order to show that an employee who resigns from his employment has in fact been constructively dismissed. In *Asara Wine Estate* the employee elected to resign rather than face a disciplinary hearing, and the court found that his resignation was premature. In *SA Police Service* the court accepted that the employee would have carried on working but for the unbearable conditions created by the employer, and that he had been constructively dismissed. In both cases the court noted that the test for the review of an arbitrator's finding of constructive dismissal is not whether the award was reasonable, but whether the arbitrator was right or wrong in arriving at his or her conclusion. In this respect the test was akin to the test for reviewing an arbitrator's finding on jurisdiction.

**Legitimate Expectation of Promotion**

In *Ramoroka and Robben Island Museum* (at 500) the CCMA commissioner accepted the complainant's argument that a claim of unfair labour practice could be founded on an employer's unfulfilled promise that had created a legitimate expectation of his promotion, but found that in the case before him such an expectation had not been proved.

**Strikes and Picketing Rules**

In *Royalserve Cleaning (Pty) Ltd v Democratic Union of Security Workers & others* (at 448) the Labour Court granted the employer party a final order requiring the respondents to comply with the picketing rules laid down by the CCMA while on strike. The court found that the provision in the rules requiring the parties first to meet to try to resolve an alleged breach was not a reasonable alternative where one of the parties had already acted in flagrant violation of the rules. In *National Union of Metalworkers of SA on behalf of Njomane & others and DPI Plastics (Pty) Ltd* (at 532), where workers had embarked on an unlawful strike and had damaged property but had complied with their employer's ultimatum to return to work, the arbitrator found that the employer had waived its right subsequently to dismiss them for striking, although it was within its rights to discipline them for misconduct.

**Disciplinary Penalty**

The Labour Court set aside an order of reinstatement in *Trident SA (Pty) Ltd v Metal & Engineering Industries Bargaining Council & others* (at 494), in which a female employee had been dismissed for hitting a male employee twice in the face. The court found that the arbitrator had disregarded the employer's policy of zero tolerance for assault in a dangerous working environment, and that the employee's defence of provocation was not sustainable because the employee had time to consider her position and could have lodged a grievance. A shop steward who was dismissed for insolence claimed in *National Union of Metalworkers of SA on behalf of Mkhwanazi and Ellies Holdings (Pty) Ltd* (at 516) that her dismissal was unfair on a number of grounds, including a lack of consultation with her union and the shop steward committee. The arbitrator found that the employee's union had been properly consulted, although only after the charge-sheet was served on the employee, and that she had not been prejudiced by that fact. The arbitrator pointed out that, although shop stewards could engage robustly with management on collective bargaining issues, that was not a licence for rudeness and undermining the employer's authority, and that her conduct had rendered the employment relationship intolerable.

**Termination of Employment — Public Service**

The Labour Court refused in *De Villiers v Premier, Eastern Cape Provincial Government & another* (at 382) to set aside a public service employee's voluntary resignation in favour of an application for early retirement, finding that the employee's claim was ill-conceived from its inception. Resignation was a unilateral act which did not require acceptance by the employer, and her employment had already terminated. *In Makade v Public Health & Social Development Sectoral Bargaining Council & others* (at 408) a bargaining council arbitrator ruled that the services of a public servant who refused to report for duty after redeployment had been terminated by operation of law in accordance with s 17(5) of the Public Service Act (Proc 103 of 1994). On review the Labour Court upheld that finding, holding that the employee was deemed to have absconded.

**Enforcement of Settlement Agreements**

The Labour Court held in *Consol Glass (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 376) that the CCMA only has jurisdiction to make a settlement agreement an award in terms of s 142A of the LRA 1995 where the underlying dispute had already been referred to the CCMA. An agreement reached prior to reference to the CCMA could not be made an award.

**Recusal for Bias**

The Labour Court refused in *Mashiya v Sirkhot NO & others* (at 420) to intervene in uncompleted disciplinary proceedings to order the recusal of the chairperson on the ground of suspected bias. The court found that such intervention should be discouraged save in exceptional circumstances, and that the employee had not shown a reasonable apprehension of bias on the part of the chairperson simply because he refused to allow legal representation at the proceedings. Similarly, in *O v S* (at 441), the employee party called for the recusal of the judge in part-heard Labour Court proceedings because he had already heard prejudicial evidence which had subsequently been excised from the record, and she feared he might not remain impartial. The court considered the test for bias, and the context in which a reasonable apprehension of bias might arise, but found that the employee had not shown such an apprehension. Her anxiety was not based on the judge's conduct but on the nature of the excluded evidence.

**Practice and Procedure**

In *Gauteng Shared Services Centre v Ditsamai* (at 348) an employee successfully referred an unfair dismissal dispute to arbitration in terms of the LRA 1995, and thereafter referred a second dispute to the Labour Court, arising from the same set of facts, alleging unfair discrimination in terms of the EEA 1998. The Labour Appeal Court considered whether in the circumstances the second dispute was *res judicata* and found that, as the issues of fact and of law before the court were not the same as those previously submitted to arbitration, the dispute was not *res judicata*. In *Giflo Engineering (Bop) (Pty) Ltd v Metal & Engineering Industries Bargaining Council & others* (at 388), in review proceedings, the Labour Court refused to allow the employer party to raise the issue of prescription by way of a letter to the court, holding that s 17(2) of the Prescription Act 68 of 1969 requires either a special plea in trial proceedings or an opposing affidavit in motion proceedings.

In *Harris & others v Commission for Conciliation, Mediation & Arbitration & others* (at 403) employees served with subpoenas to attend CCMA proceedings applied to the Labour Court to have the subpoenas set aside because they had not been properly signed in terms of s 142(2) of the LRA 1995. The court found it had no power to condone such non-compliance, and set the subpoenas aside.

**Labour Court of Namibia**

In *Old Mutual Life Assurance Co Namibia Ltd v Schultz* (at 546) the Labour Court of Namibia considered the application of the Namibian Labour Court Rules in the case of an appeal against an order of reinstatement for unfair dismissal.

***Quote of the Month:***

Steenkamp J in *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others* (2012) 33 *ILJ* 363 (LC), when considering whether the actions of an employer in the wine making industry had made the continued employment of an employee intolerable, so amounting to his constructive dismissal:

'The test remains an objective one. To use a winemaker's analogy, the court cannot consider whether, subjectively speaking, an employee with a thin skin like the Pinot Noir grape may have found employment intolerable. It has to look at the situation objectively, and an employee has to be somewhat more robust and vigorous when there are still options open to him — more like the Cabernet Sauvignon cultivar.'