INDUSTRIAL LAW JOURNAL MONTHLY PREVIEW

ISSUE 33

MARCH 2012

Dear *Industrial Law Journal* Subscriber,

We take pleasure in presenting the March 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.

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

Please accept our apologies for any inconvenience caused if you have received this mail in error.

Kind regards

Juta General Law

Ground Floor, Sunclare Building, 21 Dreyer Street, Claremont,
Cape Town, South Africa
PO Box 14373, Lansdowne 7779; Docex Number: DX 326, Cape Town
Tel: +27 21 659 2300, Fax: +27 21 659 2360

Website: www.juta.co.za; e-mail:cserv@juta.co.za

Juta and Company Ltd, REG. NO. 1919/001812/06, VAT REG. NO. 4520113319

HIGHLIGHTS FROM THE INDUSTRIAL LAW REPORTS

Regulation of Gatherings Act 205 of 1993

The Labour Court refused to grant the employer party an interdict in *ADT Security (Pty) Ltd v National Security & Unqualified Workers Union & others* (at 575) to prevent the respondent union from organizing a march to its premises where the union had already obtained permission for the march from the local authority in terms of the Regulation of Gatherings Act 205 of 1993. The court pointed out that the gathering was clearly lawful, and that the employees were not seeking to exercise their rights in terms of the Labour Relations Act 66 of 1995, but were relying on their constitutional right to assemble, demonstrate, picket and petition, as regulated by the Gatherings Act.

Protected Disclosures Act 26 of 2000

In *Arbuthnot v SA Municipal Workers Union Provident Fund* (at 584) the applicant claimed that she had been dismissed for making a protected disclosure in terms of the Protected Disclosures Act 26 of 2000, and that her dismissal was therefore automatically unfair. The Labour Court undertook a detailed review of the principles applicable to such a claim, and of the purpose of and protection afforded to employees in terms of the Act, and upheld the employee's claim. The court found that the disclosure had been made in good faith, that the employee reasonably believed the information to be true, and that it was reasonable for her to have made the disclosure. The element of good faith did not require that the employee had acted in terms of any employment related obligation of trust, confidence and loyalty to her employer.

Local Government: Disciplinary Regulations for Senior Managers 2010

In three recent decisions, *Lebu v Maquassi Hills Local Municipality (1)* (at 642), *Lebu v Maquassi Hills Local Municipality (2)* (at 653) *and Biyasi v Sisonke District Municipality & another* (at 598), the Labour Court was required to consider and interpret the wording of regulation 6 of the above regulations, when adjudicating claims by senior municipal employees that they had been unfairly suspended from their positions pending investigations into their alleged misconduct. In all three cases the court found that the municipality had failed to comply with reg 6 by providing the employee with the reasons for the suspension and affording him/her an opportunity to make representations before taking a final decision to suspend. The suspensions were set aside. In *Lebu (1)* and in *Biyase* the court noted that the employee's rights were specifically set out in the contract of employment and the regulations, and that it was not necessary to read any implied right to fairness into the contract. In *Lebu (2)* the court considered and summarized the prescribed procedure to be followed by a municipality when contemplating a precautionary suspension.

Restraint of Trade

The Labour Court in *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes & another* (at 629) reviewed the law pertaining to the enforcement of restraint of trade agreements, and noted the need to balance two primary policy considerations, namely, that parties should comply with their contractual obligations, and that all persons should be free to be productive and to engage in trade. In the case before it the court found that the employer had shown a clear right and an interest that deserved protection, but that the period of the restraint, 24 months, was too broad and should be restricted to 12 months.

Ground Floor, Sunclare Building, 21 Dreyer Street, Claremont,
Cape Town, South Africa
PO Box 14373, Lansdowne 7779; Docex Number: DX 326, Cape Town
Tel: +27 21 659 2300, Fax: +27 21 659 2360

Website: www.juta.co.za; e-mail:cserv@juta.co.za

Juta and Company Ltd, REG. NO. 1919/001812/06, VAT REG. NO. 4520113319

Essential Services and Interdicts

In an industry providing essential services, in which strikes and lock-outs were not permitted and where collective bargaining had already deadlocked, the union party in *National Union of Mineworkers & another v Eskom Holdings Soc Ltd* (at 669) approached the Labour Court for an urgent interdict to prevent the employer from unilaterally implementing its final offer pending a referral of the dispute to interest arbitration in terms of s 74 of the LRA. The court dismissed the application for various reasons, including a finding that once deadlock was reached interest arbitration was not a part of collective bargaining but a mechanism for resolving the impasse. The court also found that the applicant had failed to show urgency. In *Phakedi v Dr Kenneth Kaunda District Municipality & another* (at 700), in which an interim order had already been granted on the basis of urgency, the court found that it enjoyed a discretion to revisit the issue of urgency when considering whether to confirm the order on the return day.

Jurisdictional Issues — Bargaining Councils and the CCMA

The Labour Court found in *Mickelet v Tray International Services & Administration (Pty) Ltd* (at 661) that, where it was clear that the operations of an employer did not fall within the jurisdiction of a particular bargaining council, neither the council nor the court itself on review had the necessary jurisdiction to conciliate or to adjudicate the dispute. In *Pakana CC t/a R &W Transport Components v Dreyer NO & others* (at 692) the Labour Court reviewed and set aside a CCMA award after finding that the employer's Operations fell within the jurisdiction of a bargaining council. The court found that the employer was not deprived of the right to raise the issue for the first time at the review stage.

Determining the Employment Relationship

In *Workforce Group (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 738) the Labour Court applied the criteria laid down by the Labour Appeal Court in *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 *ILJ* 2234 (LAC) to determine the existence of an employment relationship, and confirmed a finding by the CCMA that a senior manager was an 'employee' as defined in s 213 of the LRA, and that it therefore had jurisdiction to entertain a dispute regarding alleged unfair dismissal.

Termination of Employment

The commissioner in *Lebereko and Metrorail* (at 743) found that, where an employee had been absent from work for an extended period without permission or explanation, that still did not entitle the employer to dispense with pre-dismissal procedures before terminating his contract. In *Mahesu and Red Alert TSS (Pty) Ltd* (at 749) the commissioner found a clause in the employment contract drawn up by a temporary employment service, providing for its automatic termination should its client no longer require the employee's services, to be invalid in terms of s 5 of the LRA as contravening the employee's right not to be unfairly dismissed. The principles applicable to the dismissal of a probationary employee for poor performance were considered in *Wilson and Nambiti Technologies* (at 769), in which the commissioner found that a refusal to confirm the employee's appointment without first inviting her to make representations amounted to an unfair dismissal.

Disciplinary Penalty

In *Comed Health CC v National Bargaining Council for the Chemical Industry & others* (at 623) the Labour Court considered the purpose and objective of the 'parity principle' in the application of discipline for collective misconduct on the part of employees. The objective was to ensure fairness in the v imposition of differing sanctions, and different sanctions did not automatically lead to the conclusion that a dismissal was unfair. To succeed the employee had to show that the employer acted inconsistently. In *Mtsweni and Izikhathi Security Services (Pty) Ltd* (at 759) the CCMA commissioner found that, where an employee had been absent without leave for an extended period, the employer was still under a duty to conduct a disciplinary enquiry into his absence, and to take into account his personal circumstances,

before imposing the penalty of dismissal for desertion. *Moses and Mamelodi Sundowns* (at 784) concerned the dismissal of a professional football player for poor work performance. The arbitrator stressed that the foot balling milieu differs from that of the ordinary workplace, and found that the player in question should have been able to judge for himself whether he was meeting the requirements of his club. Where he had been provided with instruction and training through coaching his dismissal for poor work performance was found to be fair.

Constructive Dismissal and Reinstatement

The arbitrator in *National Union of Metalworkers of SA on behalf of September and Peninsula Packaging* (at 773), after finding that an employee had been constructively dismissed because her employment had become intolerable, interestingly ordered her reinstatement in another department of the employer, where she would not be subject to the manager who had made her employment intolerable.

Settlement Agreements

In *Buthelezi v Liberty Group Ltd* (at 607) the Labour Court considered whether an employee, who had signed a settlement agreement accepting her dismissal for operational requirements, had done so under duress. The court found on the facts that the employee had failed to show that she was under any compulsion, and that she had signed voluntarily and had later changed her mind. The agreement was therefore valid and binding on the parties. In *Security Cleaning Manufacturing & Allied Workers Union & Another v NSA Security Services (Pty) Ltd* (at 751) the Labour Court found that an agreement to reinstate an employee 'on the same terms and conditions of employment' did not contain a tacit condition that he should accept a transfer to a different location. The agreement was made an order of court and the employer was ordered to comply with it.

Practice and Procedure

In *Cachalia & others v Vinning* (at 611) the Labour Court considered the legal requirements for the issuing of a subpoena requiring a witness to produce certain documents in court, and refused to set aside the subpoena. The documents were held to be relevant and necessary to the ventilation of the dispute. In *Ngema & others v Screenex Wire Weaving Manufacturers (Pty) Ltd & others* (at 681) the Labour Court considered the legal liability of the transferee of a business sold as a going concern for the actions of the transferor in terms of s 197(2)(*a*) of the LRA, and ordered the joinder of the transferee in proceedings instituted against the transferor for the unfair dismissal of its employees prior to the transfer. The case number was missing from the applicant's statement of claim in *Phoffu & others v Quest Flexible Staffing Solutions* (at 707). After considering the relevant Labour Court Rules, the court held that the absence of a case number rendered the referral defective, and that the opposing party was not obliged to respond. Similarly, in *SA Post Office Ltd v Moloi & others* (at 715), after considering the rules relating to service by telefax, the Labour Court held that the party wishing to prove service must show that the fax number was that of the opposing party and that all pages of the fax had been successfully transmitted. Where the transmission was incomplete the application had not been properly served. The Labour Court refused in *SA Transport & Allied Workers Union on behalf of Members v Comwezi Security* (at 727) to postpone a hearing at the request of a witness who maintained that, as a devout Muslim, he was unable to attend court during the month of Ramadan.

Peremption of the Right of Appeal

In *National Education Health & Allied Workers Union on behalf of Tumana v Commission for Conciliation, Mediation & Arbitration & others* (at 666), where the union had unequivocally accepted that a matter had been finalized by the Labour Court, the court found that the doctrine of peremption applied, and that the union was thereafter precluded from noting an appeal against the court's decision.

Labour Court of Namibia

In an unfair dismissal dispute the Labour Court of Namibia found in *Purity Manganese (Pty) Ltd v Katzoa & others* (at 789) that the conciliator of the dispute was not a court or a tribunal within the meaning of the Namibian Constitution, and therefore was not competent to make a legally binding award if one party failed to attend the proceedings.

Quote of the Month:

Van Niekerk J in Lebu v Maquassi Hills Local Municipality & others (2) (2012) 33 *ILJ* 653 (LC): 'Suspension is a measure that has serious consequences for an employee, and is not a measure that should be resorted to lightly. There appears to be a tendency, especially in the public sector, where suspension is applied as a measure of first resort and almost automatically imposed where any form of misconduct is alleged. The purpose of removing an employee from the workplace, even temporarily and on full pay, must be rational and reasonable, and must be conveyed to the employee concerned in sufficient detail to enable the employee to compile the representations that he or she is invited to make in a meaningful way. Of course, there are those instances where precautionary suspension is a necessary measure, and where the reasons to remove an employee from the workplace as a precautionary measure are compelling. But those cases will be the exception rather than the norm.'

Ground Floor, Sunclare Building, 21 Dreyer Street, Claremont,
Cape Town, South Africa
PO Box 14373, Lansdowne 7779; Docex Number: DX 326, Cape Town
Tel: +27 21 659 2300, Fax: +27 21 659 2360

Website: www.juta.co.za; e-mail:cserv@juta.co.za

Juta and Company Ltd, REG. NO. 1919/001812/06, VAT REG. NO. 4520113319