INDUSTRIAL LAW JOURNAL MONTHLY PREVIEW

ISSUE 34

APRIL 2012

Dear *Industrial Law Journal* Subscriber,

We take pleasure in presenting the April 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

An Employee's Duty of Good Faith

The plaintiff employer in *Value Logistics Ltd v Weinberg & another* (at 849) brought an action in the High Court for damages and the recovery of profits against two of its employees for the breach of their contractual duty to act in good faith towards their employer, and not to make a secret profit at the employer's expense. After reference to judicial authority the court found that the employees had made a substantial secret profit by under-invoicing for vehicles sold on the employer's behalf, and awarded damages in an amount agreed upon.

Disciplining Senior Managers in the Public Service

A senior manager who had been suspended without pay for three months and then demoted for misconduct, made urgent application to the Labour Court in *Chibi v MEC: Department of Co-operative Governance & Traditional Affairs (Mpumalanga Provincial Government) & another* (at 855) for her reinstatement, claiming that the sanctions imposed were unlawful and contrary to the disciplinary code and procedures for the senior management service. The code required that if such a sanction was imposed as an alternative to dismissal the agreement of the employee had first to be obtained. The court found that in the case before it the sanction had not been imposed as an alternative to dismissal, and that it was valid and enforceable.

Transfer of Business as a Going Concern

In *Harsco Metals SA(Pty) Ltd & another v Arcelormittal SA Ltd & others* (at 901) the Labour Court undertook an in-depth study of the factors necessary to trigger the application of s 197 of the LRA to a business transfer, and found the decisive criterion to be whether the business retained its Iii identity after the transfer. Where that criterion was met the transferee was automatically substituted as the employer of the employees engaged in the business on the date of transfer. Following the Constitutional Court judgment in *Aviation Union of SA& another v SAA Airways (Pty) Ltd & others* (2011) 32 *ILJ* 2861 (CC), the court found that second and further generation outsourcing arrangements would trigger s 197 where this criterion had been met.

Protected Disclosures Act 26 of2000

The Labour Court reconsidered the requirements for invoking the protections of the PDA in *Potgieter v Tubatse Ferrochrome & others* (at 953), in which an employee who had been dismissed for misconduct subsequently published an article alleging that the employer had caused environmental pollution. At arbitration his dismissal was found to be unfair, but the arbitrator awarded only compensation, finding that the article had damaged the trust relationship. When the employee sought to review that award, on the ground that the disclosure was protected, the court upheld the arbitrator's finding that the PDA did not apply to the employee's disclosure, which had been made in bad faith and in order to embarrass the employer.

Automatic Termination of Employment

The employee's contract of employment in *Private Security Industry Regulatory Authority v Commission for Conciliation, Mediation & Arbitration & others* (at 961) was subject to him successfully undergoing a security clearance check in terms of the Private Security Industry Regulation Act 56 of 2001. The Act provided that should clearance not be given the employer was entitled immediately to terminate the contract. While the parties were still awaiting the outcome of the check the employer terminated the employee's employment and claimed before the CCMA that, as the employment relationship was subject to successfully passing the check, it had been terminated by operation of law; there had therefore been no dismissal and the CCMA consequently had no jurisdiction. The CCMA found that it had jurisdiction. In review proceedings the Labour Court found that it was only after the outcome of the check was known

that the employer was entitled to terminate the contract, and that termination prior to that amounted to a dismissal. The court did not find it necessary to decide what the situation would have been if the employer had awaited the outcome of the check, nor whether the relationship would then be deemed to have been retrospectively terminated by operation of law.

*Thabethe & others v Lamprecht Properties CC (*at 986) concerned the early termination of fixed-term contracts which provided that the contracts would be for a period of 24 weeks or until completion of the project for which the employees were hired. When the employer decided to put the project on hold the Labour Court found that the contracts did not terminate automatically, and that the employees had been unfairly retrenched.

Strikes, Unprotected Strikes and Unfair Discrimination

The Labour Court upheld the dismissal of employees who had embarked on unprotected work stoppages in *SA Clothing & Textile Workers Union & others v Berg River Textiles — A Division of Seardel Group Trading (Pty) Ltd* (at 972), finding their misconduct to have been serious and in disregard of a collective agreement negotiated by their own union. At the same time the court found the dismissal of an employee who had refused an instruction to work on a Sunday owing to his religious beliefs to amount to unfair discrimination on the ground of religion, and to be automatically unfair. In *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (at 998) the Labour Court expressed extreme displeasure at the violent and lawless behaviour of employees who took part in a protected strike, discharging an urgent interdict previously granted to the employer and ordering costs against the employees and their union.

Extension of Bargaining Council Agreement to Non-Parties

In *National Employers' Association of SA & others v Minister of Labour & others* (at 929) the Labour Court refused to grant the applicant association an urgent order declaring the extension of a bargaining council agreement to non-parties to be invalid due to alleged irregularities in the constitution and appointment of the bargaining council itself. The court found that the provisions of s 206(1) (*c*) of the LRA precluded the association from relying on such irregularities to invalidate any collective agreement or act of the council that would otherwise be binding in terms of the LRA. In any event, the association had an alternative remedy available to it, namely, a right of review in terms of the LRA.

Automatically Unfair Dismissal

The managing director of the South African subsidiary of an overseas holding company refused in *Harding v Petzetakis Africa (Pty) Ltd* (at 876) to dismiss two employees summarily despite an express instruction from her employer to do so, claiming that the employer was requiring her to act unlawfully, in breach of both the LRA 1995 and the Companies Act 61 of 1973. The Labour Court found her own subsequent dismissal to be automatically unfair in terms of s 5(2) (*c*)(iv) read with s 187(1) of the LRA, being dismissal for refusing to comply with an unlawful instruction.

Appropriate Disciplinary Penalty

The CCMA commissioner in *Naidoo and Toyota SA Motors (Pty) Ltd* (at 1004) was required to consider whether dismissal was an appropriate penalty for an employee with a clean disciplinary record who had removed small items of little value from his workplace without authority. After reviewing relevant case law the commissioner found the employer's decision to dismiss to be in accordance with company rules and, although hard, to be fair and reasonable.

The Powers of the CCMA to Rule on Jurisdictional Issues

The CCMA commissioner in *Rambado and EZ Shuttle (Pty) Ltd* (at 1016) was required to rule as to whether he had jurisdiction to arbitrate a dispute which the employer maintained had been settled by agreement. The commissioner first found that he had the power to pronounce on the validity of the agreement, and then considered the frequently conflicting jurisprudence on the issue of rulings as to jurisdiction, concluding that 'practicality considerations' required him to make a ruling as to the CCMA's jurisdiction 'for purposes of convenience'.

Unfair Labour Practice – Demotion

An employer who had demoted an employee for alleged misconduct, after the employee had failed repeatedly to pass a test qualifying him for promotion, was found at arbitration in *SA Commercial Catering & Allied Workers Union on behalf of Shirinda and Pick 'n Pay (Centurion)* (at 1025) to have committed unfair labour practices relating not only to promotion, but also to probation and training, and to have imposed an unfair disciplinary penalty short of dismissal.

When a Second Disciplinary Enquiry May Be Allowed

The arbitrator in *Theewaterskloof Municipality and Independent Municipal & Allied Trade Union on behalf of Visagie* (at 1031) had to consider when, according to general case law, an employer would be justified in holding a second disciplinary enquiry into an employee's misconduct after having already held one enquiry and having imposed a sanction. The arbitrator found the test to be 'fairness', which favoured the employee, and that general case law required that an employee should not be recharged in the absence of exceptional circumstances or some other factor to shift that balance.

Interruption of Prescription

After considering the wording of the Prescription Act 68 of 1969 the Labour Court held in *Food & Allied Workers Union & others v Country Bird* (at 865) that the service of a statement of claim by workers who had been dismissed for striking had interrupted the prescription of their claim, even though the matter only finally came to trial some five years later. The subsequent excessive delay was found to be partly attributable to the employer and partly to systemic delays within the court system, and did not warrant non-suiting the applicant employees.

Practice and Procedure

In *High Tech Transformers (Pty) Ltd v Lombard* (at 919), in which a notice of motion had not been signed by the applicant party's legal representative, the Labour Court considered whether this rendered the application fatally defective. The court found that, although the Rules of Court appeared to be peremptory, it had discretion to condone non-compliance, but that it was not in the interest of justice to do so in the case before it. In *Potgieter v Tubatse Ferrochrome & others* (at 953) the Labour Court held that in a review application it was necessary only to file those portions of the record that were relevant to the issue in dispute, and not to burden the court with the entire record, including parts which were not relevant. In *Top Security (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 992), in which a respondent in a review application had failed to file an answering affidavit, the court found the matter had to be treated as unopposed.

Evidence

The Labour Court drew an adverse inference in *Harding v Petzetakis Africa (Pty) Ltd* (at 876) from the employer party's failure to call evidence in rebuttal after the employee had established a prima facie case of automatically unfair dismissal. In *Northam Platinum Mines v Shai NO & others* (at 942) the Labour Court considered the current interpretation of the cautionary rule applicable to the evidence of single witnesses in criminal matters, and found that there is no set formula to apply when considering the

credibility of a single witness at arbitration. The arbitrator should weigh the probabilities of the respective versions and make credibility findings to arrive at an outcome.

Quote of the Month:

Van Niekerk J in *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (2012) 33 *ILJ* 998 (LC): 'This court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is an integral part of the court's mandate, conferred by the Constitution and the LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status.'