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Dear *Industrial Law Journal* Subscriber,

We take pleasure in presenting the June 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 the electronic *Industrial Law Journal*. At the time of this 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

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JUTA'S LABOUR LAW SEMINAR UPDATE 2011

PUT YOUR TRAINING BUDGET TO WORK AND REAP THE BENEFITS OF THIS SEMINAR FOR YOUR ENTIRE ORGANISATION.

Keeping abreast of important developments in the ever-changing area of labour law is a prime concern for labour law and HR practitioners. Juta's Annual Labour Law Seminar, now in its 12th year, is a comprehensive one-day update, bringing you practical information about current developments in all the critical areas of labour law. Our panel of renowned experts will highlight potential pitfalls and provide you with the information needed to ensure that your IR and HR practices are up to date and compliant.

Our expert team of speakers will discuss the most recent important case law and statutory developments affecting the employment relationship. Important statutory changes are under consideration, so this year's hot topics will include labour brokers, temporary employment and protection of personal information.

Delegates will also receive an electronic newsletter service during the course of the year incorporating key case law and commentary, written by the panel, keeping you up to date with the law affecting your business **ALL YEAR ROUND.**

DATES AND VENUES

4 SEPTEMBER 2012	CTICC, Cape Town
5 SEPTEMBER 2012	Hilton Hotel, Durban
6 SEPTEMBER 2012	Radisson Blu Hotel, Port Elizabeth
25 SEPTEMBER 2012	CSIR Convention Centre, Pretoria
26 SEPTEMBER 2012	Indaba Hotel, Fourways
27 SEPTEMBER 2012	Ilanga Estate, Bloemfontein

HIGHLIGHTS FROM THE INDUSTRIAL LAW REPORTS

Liability of Trade Union to Members

The High Court, in *Ngcobo & another v Food & Allied Workers Union* (at 1337), found that the defendant trade union had agreed to refer an unfair dismissal dispute on behalf of two members to the CCMA and, thereafter, to the Labour Court. Its failure to render legal assistance to its members by neglecting to refer their dispute to the Labour Court was a breach of its obligation and the members were entitled to damages arising from the union's breach.

Transfer of Business as a Going Concern

The Labour Appeal Court upheld the decision of the Labour Court in *Long v Prism Holdings Ltd & another* (2010) 31 *ILJ* 2110 (LC), where it was held that, as a company continued to exist as a separate entity from its shareholders after the sale of all its shares to another company, the sale of the shares did not constitute the transfer of a business as a going concern within the meaning of s 197 of the LRA 1995 (*Long v Prism Holdings Ltd & another* at 1402).

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Basic Conditions of Employment Act 75 of 1997

In *Cenge & others v MEC, Department of Health, Eastern Cape & another* (at 1443) the Labour Court granted the applicant employees an interdict prohibiting the department from making deductions from their wages where the department had unilaterally determined the method of deduction in contravention of s 34(1) and (5) of the BCEA.

Dismissal — Derivative Misconduct

The employer believed that several employees had colluded to remove a large quantity of steel products from its premises. They were charged with derivate misconduct and were dismissed. At bargaining council arbitration (*Nobhabha and Gammid Trading (Pty) Ltd* at 1523) the arbitrator set down the requirements for proof of derivative misconduct. He found that, as the employee had made a bare denial of his involvement, the probabilities favoured the conclusion that he had participated in or had been aware of the theft and failed to report it. This was a breach of his duty of good faith and constituted serious misconduct. Dismissal was the only appropriate sanction given the breach of the trust relationship.

Dismissal — Incapacity

The employee had been barred from entering a shopping centre following allegations of theft against her and she was thus unable to tender her services at her employer's shop in the centre. She was dismissed. In unfair dismissal proceedings before the CCMA, in *Moeketsi and Spilkin Optometrist* (at 1502), the commissioner found that the true reason for her dismissal was incapacity based on a supervening impossibility of performance. In considering whether her dismissal was fair, the commissioner noted that the following factors had to be taken into account: the reasons for the incapacity, the extent of the incapacity, whether it was permanent or temporary, and whether there were any alternatives to dismissal.

In *Vogel and Power Treads CC* (at 1533) the bargaining council arbitrator found that, as the employee had been injured at work, the employer had a more onerous burden to accommodate him. The employer could not simply dismiss the employee without adequate consultation and without considering alternative positions for him.

Disciplinary Penalty — Consistency

In *Mphigalale v Safety & Security Sectoral Bargaining Council & others* (at 1464) the Labour Court considered whether the bargaining council arbitrator had committed a gross irregularity by imposing a sanction of dismissal on the employee for corruption where two other police officers had earlier been given sanctions short of dismissal for the same offence. The court found that there was evidence before the arbitrator that the sanctions in the earlier matters had been imposed in error and that, although as a general rule fairness requires that like cases be dealt with alike, an employer is not required to repeat a decision made in error or one which is patently wrong. This was especially so given the nature of the misconduct committed in this matter and the employee's position as a police officer.

Employee of Labour Broker

In *Mulder and Special Investigating Unit & another* (at 1508) the applicant contended that she had been dismissed by the SIU. The evidence showed that the applicant had been employed by a labour broker, had been seconded to the SIU, had been offered employment by the SIU, but had not met its strict requirements and her services had been terminated. The commissioner found, inter alia, that the employee could not be deemed to be an employee of the SIU in terms of s 213 of LRA 1995 simply because the circumstances appeared to indicate the existence of an employment relationship. That interpretation would entitle every temporary employment service employee to claim that she or he was in fact an employee of the client and that would be untenable.

Evidence — Admissibility of Expert Opinion on Kleptomania

In bargaining council arbitration proceedings the arbitrator had admitted medical reports which the employee tendered to prove his defence of kleptomania to the employer's prima facie case of unauthorized removal of company property. On review in *Transnet Rail Engineering Ltd v Transnet Bargaining Council & others* (at 1481), the Labour Court found that, in admitting the medical reports, the arbitrator ought to have applied the principles governing the admissibility of expert opinion evidence. The arbitrator had not called the experts who compiled the reports to testify and he had not only accepted the contents of the reports as evidence but had regarded the opinions expressed in them as binding on him without evaluating their conclusions. The arbitrator clearly abdicated his responsibility to scrutinize the evidence to determine whether the conclusions reached could be logically supported by other evidence to make the conclusions sustainable. The arbitrator had therefore committed a gross irregularity and the award was set aside.

Review of CCMA and Bargaining Council Arbitration Awards

In *Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 1381) the Labour Appeal Court found that it was apparent that, in arriving at his decision, the CCMA commissioner had not taken proper account of the material placed before him and had failed to conduct a proper appraisal of some critical portions of that material. The award was irrational and clearly not one that a reasonable decision maker would have arrived at, and was set aside. However, in *Ikwezi Municipality v SA Local Government Bargaining Council & others* (at 1447) the Labour Court upheld an award in terms of which the bargaining council arbitrator had found the employee guilty of serious misconduct but then found that the sanction of dismissal was inappropriate. The court found that the arbitrator had applied his mind to the material facts and had balanced the interests of the parties before making a value judgment on facts before him. In these circumstances, interference with the sanction would violate principles laid down in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC).

The LAC found, in *National Commissioner of the SA Police Service v Myers & others* (at 1417), that, in determining whether the sanction imposed by a bargaining council arbitrator is reviewable, a review court must consider whether the sanction is that of the arbitrator himself or herself, and on the evidence presented at the arbitration and on the facts and circumstances properly made available to the arbitrator, the sanction is one that could reasonably be imposed or upheld. In the matter before it, the majority found that the sanction of dismissal, although harsh, was not so unreasonable that it stood to be set aside.

In *Siemens Ltd v Commission for Conciliation,Mediation & Arbitration & others* (at 1476) the Labour Court declined to set aside a certificate of outcome issued by a conciliating commissioner, having found that the commissioner was not bound to determine whether an employment relationship existed before issuing the certificate. Although rule 14 of the CCMA Rules requires a commissioner to determine whether the CCMA has jurisdiction to conciliate where a jurisdictional challenge is raised at conciliation, the court agreed with *Bombardier Transportation (Pty) Ltd v Mtiya NO & others* (2010) 31 ILJ 2065 (LC) that the only true jurisdictional questions likely to arise at conciliation are whether the referring party has referred the dispute within the prescribed timelimit, whether the parties fall within the registered scope of a bargaining council that has jurisdiction over the parties to the exclusion of the CCMA, and perhaps whether the dispute concerns an employment related matter at all.

Practice and Procedure

The Labour Appeal Court, applying the provisions of s 21A(1) and (3) of the Supreme Court Act 59 of 1959, dismissed an appeal in *City of Cape Town v SA Municipal & Allied Workers Union on behalf of Abrahams & others* (at 1393) having found that there was no longer any dispute between the parties arising from the issue that was before the court below. In *Trentyre (Pty) Ltd v National Union of Metalworkers of SA & another* (at 1438) the LAC found that, although rule 4 of the Labour Appeal Court Rules did not provide for the granting of condonation for the late filing of a petition for leave to appeal, the court did have jurisdiction to condone non-compliance on good cause shown.

In *Nyathi v Woolworths (Pty) Ltd* (at 1520) the applicant employee applied for the rescission of a ruling dismissing his application which had been granted in his absence. The CCMA commissioner found that the explanation for the employee's absence was acceptable and that he had shown prima facie prospects of success. He granted the application for rescission.

Collective Agreement — Rectification

The applicant union approached the Labour Court in *UASA—The Union v Lonmin Platinum comprising Western Platinum Ltd & Eastern Platinum Ltd* (at 1491) for an order declaring that an oral agreement had been concluded between the parties and for rectification of a wage agreement to incorporate the terms of the oral agreement. The court found that, as the oral agreement was not a collective agreement, the provisions of s 23 of the LRA 1995 regarding the union's authority to conclude agreements binding on its members were not applicable and that the union therefore had to prove that it had the necessary authority to act as agent for its members and that the individual members had accepted the benefits flowing from the oral agreement. This the union had failed to do. In addition, the union had failed to prove the necessary essentials for the existence of an agreement. The respondent was granted absolution from the instance.

Compensation

In bargaining council arbitration proceedings the arbitrator had found the employee's dismissal to be substantively and procedurally unfair and had ordered his reinstatement and awarded him 21 months' compensation. The employer objected in *Johannesburg City Parks Ltd v Toli NO & others* (at 1456) to the award of compensation on the ground that the employee had been to blame for the excessive delay in finalizing the arbitration. The Labour Court found that both parties and the bargaining council had contributed to the delay, and dismissed the review with costs.

Jurisdictional Issues

Where the employee's dispute relating to the SA Police Service's failure to promote him arose in July 1996, the Labour Appeal Court found, in *National Commissioner of the SA Police Service & another v Mfeketo* (at 1412), that the dispute arose before the commencement of the LRA 1995, that the matter ought to have been dealt with in terms of the provisions of the LRA 1956 read with the transitional provisions of schedule 7 to the LRA 1995 and that neither the SSSBC nor the Labour Court had jurisdiction.