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Dear *Industrial Law Journal* Subscriber,

We take pleasure in presenting the July 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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HIGHLIGHTS FROM THE INDUSTRIAL LAW REPORTS

Retrenchment and Reinstatement

Five years after an employer purported to retrench a group of employees who had taken part in a particularly violent and prolonged strike because, it maintained, witnesses were too intimidated to come forward in disciplinary proceedings, the Labour Appeal Court has, in *Food & Allied Workers Union on behalf of Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River* (at 1779), now ordered that those dismissed be reinstated. The court below (reported at (2010) 31 *ILJ* 1654 (LC)) found the dismissals to be unfair because the employer was not entitled to resort to the procedure in s 189 of the LRA 1995 simply because it could not prove the charges against the employees. However, at the same time it found that the employment relationship had broken down, and that reinstatement was not appropriate. On appeal the LAC has found that the employer failed to prove either that it had employed fair and objective criteria in the selection of those chosen for retrenchment, or that those chosen had engaged in any acts of violence or intimidation. There was therefore no evidence that the employment relationship was not sustainable and the employees had to be reinstated.

In *Revan Civil Engineering Contractors & others v National Union of Mineworkers & others* (at 1846) the Labour Appeal Court found that, in a retrenchment to which s 198A of the LRA applied, the employer's failure to comply with the requirements of that section had rendered the dismissals null and void. Any question as to the fairness of the retrenchments therefore did not arise.

The Test for the Review of Arbitration Awards

In *Herholdt v Nedbank* Ltd (at 1789) the Labour Appeal Court had to consider whether the court below had been correct when it reviewed and set aside an arbitration award after finding that the commissioner had ignored material evidence before her, and so had committed a latent process linked irregularity which had prevented a fair trial of the issues. After a close examination of the test for review adopted by the courts the LAC was satisfied that the approach adopted by the court below was correct and consistent with the prevailing law regarding review on the grounds of unreasonableness. The court recognized the distinction drawn by the legislature between reviews and appeals, and questioned whether the time had not come to rethink the issue, and whether justice might be better served were the relief in respect of arbitration awards to be an appeal rather than a review.

Labour Court Jurisdiction — Public Service

In *Public Servants Association of SA on behalf of De Bruyn v Minister of Safety & Security & another* (at 1822) the Labour Appeal Court considered the extent of the review powers entrusted to the Labour Court in terms of s 158(1)(*h*) of the LRA 1995, in respect of the discretion enjoyed by the National Commissioner of SAPS to grant or refuse applications for special incapacity leave. The court found that in the case before it the police service employee's claim derived not from administrative law but from the LRA 1995, and that it was governed by a binding collective agreement. The dispute therefore had to be submitted to bargaining council arbitration, and the Labour Court lacked jurisdiction to adjudicate the matter.

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Bargaining Council Jurisdiction

The Labour Appeal Court found in *National Bargaining Council for the Road Freight Industry & another v Carlbank Mining Contracts (Pty) Ltd & another* (at 1808) that a clause in an employee's contract of employment, which provided that any disputes arising from his employment should be referred to private arbitration, was invalid in terms of s 199 of the LRA 1995, because it excluded the dispute-resolution provisions of the bargaining council agreement under which his industry fell. The LAC found that the bargaining council still retained jurisdiction to arbitrate the employee's dispute because the private arbitration agreement afforded the employee less favourable treatment than that contemplated by the collective agreement. The primary object of s 199 was to promote collective bargaining at sectoral level and to give primacy to collective agreements above individual contracts of employment.

In *Kouga Municipality v SA Local Government Bargaining Council & others* (at 1857) the Labour Court pointed out that the constitution of a bargaining council is not in itself a collective agreement, but merely the means by which the council is created and which regulates the council's powers. The jurisdiction of the SALGBC was spelt out not in its constitution but in its main collective agreement, and it included dealing with disputes involving municipal managers, who were otherwise excluded from the terms of the agreement.

Breach of Contract — Sporting Body

The Dispute Resolution Chamber of the National Soccer League held in *Mofokeng & others and African Warriors Football Club* (at 2008) that professional football players who claimed that their club had breached their contracts of employment were not bound to refer their disputes to the DRC within the time-limits prescribed by the NSL in the case of dismissal disputes. This provisions had to be construed in conformity with the Constitution and with the common law.

Strikes and Strike Issues

In *SA Commercial Catering & Allied Workers Union & others v Check One (Pty) Ltd* (at 1922) some employees who had taken part in an unprotected strike were given final written warnings while others, who were also involved in violence and intimidation, were dismissed. The Labour Court found that this did not amount to selective punishment. Those dismissed were dismissed for misconduct during the strike, and not for striking, and their dismissal was fair. Similarly, in *National Union of Metalworkers of SA on behalf of Mhlanga & others and Geneva AD (Pty) Ltd* (at 1885) employees who engaged in violence and intimidation while taking part in a protected strike were held in arbitration proceedings to have been fairly dismissed. In *SA Post Office Ltd v TAS Appointment & Management Services CC & others* (at 1958) the post office applied to the Labour Court to interdict an unprotected strike in which the striking workers were employed by a number of temporary employment services which supplied labour to the SAPO. The Labour Court noted that the LRA does not specify who may bring such applications, and held that to establish locus standi the SAPO had to show that the strike was not protected and that it infringed one or more of its legal rights. As this was clearly the case the interdict was granted.

Essential Services — Compulsory Arbitration

Public Servants Association on behalf of PSA Members v National Prosecuting Authority & another (at 1831) concerned an agreement to upgrade public service posts where the recommended upgrades were by regulation subject to the availability of funds, which had been refused by the Treasury. At compulsory arbitration in terms of s 74 of the LRA 1995 the arbitrator found that the employees had made out a

good case for relief and ordered the employer to implement the upgrades. The Labour Court set aside that award as being unreasonable. On appeal the Labour Appeal Court found that the arbitrator was not bound by the regulations, that the dispute was one of interest and that the award was beyond reproach. If the employer was unable to comply with the award because funds were not available it was enjoined by s 74(5) to table it before parliament.

Unfair Labour Practice — Benefits

The arbitrator in *Independent Municipal & Allied Trade Union on behalf of Pregnolato & others and City of Cape Town* (at 1984) was required to rule whether a scheme whereby the employer undertook to pay for certain costs incurred by employees who used their own vehicles for work amounted to a benefit in terms of s 186(2) of the LRA. The employees claimed that it did, and that by altering the terms of the scheme the employer had committed an unfair labour practice. Relying on *Minister of Justice & another v Bosch NO & others* (2006) 27 *ILJ* 166 (LC), the arbitrator found that because the allowance was only payable when work was performed it was a reimbursive allowance, and did not amount to a benefit.

Fixed-term Contract — Early Termination

The Labour Court found in *Abdullah v Kouga Municipality & another* (at 1850) that the fact that a municipality had lost confidence in its employee was not sufficient to warrant the early termination of his fixed-term contract of employment, but that an order of reinstatement would not be appropriate.

Practice and Procedure

The Labour Court dismissed an application to review a bargaining council award in *Liwambano v Department of Land Affairs & others* (at 1862), in which the applicant had made no effort, in the absence of a coherent transcription of the record, to reconstruct the record as required by the court rules. The court held that the applicant should call on the arbitrator to read his illegible bench notes into the record and have them transcribed, and then call on the council to convene a meeting to reconstruct the missing portions. In *Mabogoane v Commission for Conciliation, Mediation & Arbitration & others* (at 1874), in which the record was similarly missing, the Labour Court considered the position of the unrepresented lay litigant, and found that in such a situation it was the duty of a qualified representative of the employer party to alert the litigant to the requirement for a complete record, and to advise him/her where to obtain suitable advice. The Labour Court in *SA Police Service v Safety & Security Sectoral Bargaining Council & others* (at 1933) stressed the requirement for arbitrators to record all evidence led diligently and accurately, not only that which fitted the outcome they wished to reach. In *Mabitsela v Department of Local Government & Housing & others* (at 1869) the Labour Court emphasized an arbitrator's duty to inform a litigant of his/her right to an interpreter, and to ensure that such assistance was provided. A failure to do so rendered the proceedings reviewable.

Joinder

The Labour Court ordered the joinder of three other employer entities to the proceedings in *National Union of Metalworkers of SA on behalf of Members v Steinmuller Africa (Pty) Ltd & others (*at 1885), which concerned a dispute regarding dismissals after strike action, where it was clear that they employed certain of the dismissed employees and had a substantial interest in the proceedings. That they had not been parties to the conciliation proceedings was not a bar to their joinder.

Evidence

The Labour Court found in *National Union of Mineworkers & another v Commission for Conciliation, Mediation & Arbitration & others* (at 1989) that the CCMA commissioner had been correct to accept the evidence of a handwriting expert which showed, on a balance of probabilities, that the applicant employee had written an entry in a register that implicated him in misconduct. However, in *Rambar Construction (Pty) Ltd t/a Rixi Taxi v Commission for Conciliation, Mediation & Arbitration & others* (at 1911), in an application to review a CCMA award, the Labour Court held that the applicant was not entitled to rely on fresh evidence that had not been placed before the commissioner in order to support its application for review. Such evidence must be brought and tested at arbitration. In *Lephuthing and MNT (Pty) Ltd* (at 1965), in the absence of any direct evidence, the commissioner accepted a combination of hearsay and circumstantial evidence, together with that of a polygraph examiner to find that the employer had discharged the onus on it to find the employee party guilty of being an accessory to theft. The commissioner in *Rahlagana & another and Home by MCA (Pty) Ltd* (at 1972) considered the law regarding the assessment of the evidence of witnesses whose versions were mutually destructive. He concluded that the party bearing the onus must show on a balance of probabilities that his version was true and accurate, and that the alternative version should be rejected.

Quote of the Month:

Murphy AJA in *Herholdt v Nedbank Ltd* (2012) 33 *ILJ* 1789(LAC) (commenting on the reasons given by the drafters of the LRA 1995 for limiting the relief available in respect of arbitration awards to review rather than appeal):

'The inexorable truth is that wrong decisions are rarely reasonable. If that is true, the hypothetical reward from limiting intervention to a reasonableness or rationality review is dubious. On the contrary, we risk reducing the final adjudication to an exercise in semantics or hair splitting in pursuit of a perceived socially expedient advantage that is at best illusory. . . I would therefore tentatively venture that the time has come for the social partners and the legislature to think again. Justice for all concerned might be better served were the relief against awards to take the form of an appeal rather than a review. The protection granted by a narrower basis for intervention is, in all likelihood, fanciful — a chimera.'

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