INDUSTRIAL LAW JOURNAL MONTHLY PREVIEW

VOLUME 33

SEPTEMBER 2012

Dear *Industrial Law Journal* Subscriber,

We take pleasure in presenting the September 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

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

The Test for Review — Applying 'Sidumo'

The Labour Appeal Court was required in *Wasteman Group v SA Municipal Workers Union* (at 2054) to consider two components of the standard test for review as articulated in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC); firstly, the factors to be considered by a commissioner when assessing whether an employer's decision to dismiss was fair, and secondly, the test to be applied by a court reviewing the commissioner's decision. The court found that a reasonable decision maker in the position of the commissioner should have analysed the facts before her and found a plausible justification for imposing the sanction of dismissal before finding the employer's decision to be fair, and that the court below had been correct in finding that the commissioner's decision was therefore not one that a reasonable decision maker could have reached.

Public Service — Suspension Pending Disciplinary Enquiry

In *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (at 2033) a senior public servant, whose terms of employment were covered by the provisions of the Senior Management Service Handbook, sought an interdict challenging his employer's right to suspend him on full pay pending an enquiry into allegations of serious misconduct which, depending on the outcome of the enquiry, could result in disciplinary action against him. He claimed the right to be heard before a decision was taken to suspend him. After detailed consideration of the requirements of the SMS Handbook and of the development of the *audi alteram partem* rule in relation to proposed suspensions, the Labour Appeal Court found that the right to a hearing prior to a precautionary suspension arose not from the Constitution or administrative law but from the right of an employee in terms of s 185(*b*) of the LRA not to be subjected to unfair labour practices. That being so, the court below should not have ruled on the lawfulness of the suspension, but should have referred the matter for conciliation and arbitration before the CCMA or the relevant bargaining council.

In *Legodi & others and Northern Cape Provincial Legislature* (at 2213) the CCMA commissioner, when considering a claim by senior public servants that their suspension pending an investigation into alleged misconduct amounted to an unfair labour practice in terms of s 186(2)(*b*) of the LRA, found that, in view of the risk which they posed of influencing or intimidating junior staff, their precautionary suspension was not unfair.

SAPS — Suspension Without Pay

In *Police & Prisons Civil Rights Union on behalf of Sephanda & another v Provincial Commissioner, SA Police Service, Gauteng Province & another* (at 2110) the Labour Court granted an urgent application to set aside a decision by the respondent commissioner to suspend two employees without pay pending disciplinary proceedings against them. The court found suspension without pay to be a drastic measure, making serious inroads into an employee's common-law right to remuneration while he remained in employment and tendered his services. Further, the disciplinary hearings were already under way when the notice of suspension was given and it stated no precautionary purpose. The commissioner had acted outside the powers granted to him in terms of the SAPS Discipline Regulations.

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

Strikes and Strike Issues

Where a collective agreement stipulated that substantive issues should be negotiated at national level, the Labour Court has found in *ADT Security (Pty) Ltd v SA Transport & Allied Workers Union & another* (at 2061) that the parties were prohibited from raising those issues at regional or local level, and that a proposed strike to enforce a demand at regional level would be unprotected. The employer and trade union parties in *Apollo Tyres SA (Pty) Ltd v National Union of Metalworkers of SA & others* (at 2069) entered into a collective agreement providing for a three-shift system for certain workers, which was later extended orally to cover all employees in the factory. When the employer sought to amend the shift system the employees claimed that this amounted to a change to their terms and conditions of employment. The Labour Court granted an order interdicting all the employees from embarking on strike action. The court found that, in respect of those to whom the agreement had been extended orally, it was not a collective agreement, which must be in writing, and that the change merely amounted to a change in work practices which fell within the employer's prerogative. In respect of those covered by the collective agreement, the agreement itself allowed the employer to modify the system after consultation, which it had undertaken.

Constitutional Law

The employer party in *Concord Employment Contractors (Pty) Ltd v Motor Industry Bargaining Council & others* (at 2077) sought an order declaring a clause in a collective agreement to be inconsistent with s 22 of the Constitution and s 198 of the LRA because it restricted the right of the employer to 'choose its trade, occupation or profession freely'. In Labour Court proceedings the court dismissed the respondent's preliminary objection that the employer had no *locus standi* to bring the application, because the right in terms of s 22 extended only to natural persons. The court held that the word 'citizen' in s 22 should be read to include juristic persons and that the employer had the necessary *locus standi*. In *Sgt Pepper's Knitwear & another v SA Clothing & Textile Workers Union & others* (at 2178) the Labour Court refused to consider the applicant's challenge to the constitutionality of s 105 of the LRA on the ground that it restricted the applicants' right of access to the courts, finding that the point was not necessary to dispose of the case before it.

Disclosure of Confidential Information

When presenting his case for unfair dismissal before the CCMA the employee party in *Mabe and Onderstepoort Biological Products* (at 2220) disclosed certain documents belonging to his employer which the employer deemed to be confidential. The arbitrating commissioner rejected the employer's assertion that he had no right to make such a disclosure before the CCMA while pursuing his unfair dismissal dispute, and found that he had the right to use the information as evidence.

Dismissal for Gross Insubordination

The bargaining council arbitrator in *Metal & Electrical Workers Union of SA on behalf of Mashiloane & others and Micro Electrical Power Devices (Pty) Ltd* (at 2244) found the refusal by a group of employees to attend training sessions arranged for them by their employer amounted to gross insubordination which warranted dismissal for a first offence.

Repudiation of Contract

In *De Neijs and Jacaranda 94.2* (at 2207), in which an employee claimed that she had been constructively dismissed after she wrote a letter to her employer advising that she believed the employment relationship between them had irretrievably broken down, the CCMA commissioner held that she had in fact repudiated her contract of employment, which repudiation the employer had been entitled to accept.

Deregistration of Trade Unions and Employers' Organizations

Following recent court judgments ruling that a decision by the Registrar of Labour Relations to deregister a trade union or an employers' organization is not stayed pending an appeal, three cases have come before the Labour Court appealing against his decisions in terms of s 111(3) of the LRA. In *Consolidated Association of Employers of Southern Africa Region v Registrar of Labour Relations* (at 2085), in which the registration of an employers' organization had been cancelled on the grounds that the organization was operating for gain, the court set aside the cancellation. The court listed the various factors to be taken into account by the registrar when assessing whether an organization was operating for gain, and held that more was required than just showing the mere receipt of payments or a failure to state the qualifications for membership in its constitution. In *Retail & Allied Workers Union v Registrar of Labour Relations & another* (at 2149) the court found that a two-year delay between notifying the applicant trade union of the registrar's intention to deregister it and actually cancelling the registration was unreasonable and not justifiable within the context of fair and just administrative action. In addition, the registrar had failed to have regard to representations made by the union prior to deciding to cancel its registration. In *SA United Commercial & Allied Employers' Organisation v Registrar of Labour Relations* (at 2172), the court granted an employers' organization an interlocutory application to suspend the implementation of its deregistration pending the outcome of its appeal in terms of s 111. The court found that, although the lodging of an appeal did not automatically suspend the decision to deregister, the court could exercise its discretion to suspend the operation of that decision having regard to the various factors which it enumerated.

Application for Leave to Appeal

The Labour Court dismissed an application for leave to appeal to the Labour Appeal Court in *MCC Contractors (Pty) Ltd v Johnston NO & others* (at 2096) where the applicant had filed the application late and had not applied for condonation. The court noted the important policy considerations which necessitated the imposition of time-limits and, in labour legislation, the need to resolve labour disputes speedily.

The Right to Legal Representation

The Labour Court held in *Ngcongo v University of South Africa & another* (at 2100) that the respondent employer's disciplinary panel had a discretion to allow external legal representation to those taking part in its proceedings, notwithstanding that its disciplinary code did not permit such representation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO & others* (at 2117) the Labour Court held that the question whether the chairman of a disciplinary enquiry had a similar discretion in the face of a collective agreement prohibiting legal representation was a matter to be determined at arbitration. *Sukazi v Commission for Conciliation, Mediation & Arbitration & others* (at 2188) concerned a commissioner's ruling in arbitration proceedings refusing the employee party the right to legal representation. On review the Labour Court set aside the ruling, finding that the commissioner had failed to apply rule 25(1)(*c*) of the CCMA Rules, which regulates the right to legal representation, and had instead fashioned his own test. In arbitration proceedings in *Manaka and African Bank Ltd* (at 2240), applying rule 25, the CCMA commissioner granted the employee legal representation where it appeared

that the employer's representative, although appearing in her capacity as an employee, was in fact an admitted attorney.

Practice and Procedure

In *Public Servants Association of SA on behalf of Khan v Tsabadi NO & others* (at 2117) the Labour Court considered and restated the correct procedure to be followed by an applicant in reconstructing an incomplete record of bargaining council proceedings for the purposes of a review. The Labour Court refused in *TAS Appointment & Management Services v Mavuso & others* (at 2196) to grant the employer party an order staying a writ of execution against it for the payment of compensation to the respondent employees, pending an application by the employer for the rescission of an order dismissing its application for the review of the original award. The court recognized that the employer might suffer irreparable financial harm if it were successful in its application for rescission, because the employees might be unable to refund it, but found that the employer had only itself to blame for failing to pursue its review application within a reasonable time. In *Sgt Pepper's Knitwear & another v SA Clothing & Textile Workers Union & others* (at 2178) the Labour Court applied the 'once and for all' rule in a case where the court had already made a ruling on the same substantive issues that the applicant now brought before the court for a second time, and found that the applicant had no *locus standi.*

Evidence

In *Urban African Security (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 2201) the Labour Court reviewed and set aside an arbitration award in which the commissioner had accepted the employee's version of events, although that version had never been put to the employer during cross-examination and had only been raised for the first time during the arbitration proceedings.

Quote of the Month:

Hulley AJ in Public Servants Association of SA on behalf of Khan v Tsabadi NO & others (2012) 33 *ILJ* 2117 (LC):

'Costs are to be awarded according to the requirements of the law and fairness.

My inclination is that unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.'