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Dear *Industrial Law Journal* Subscriber,

We take pleasure in presenting the October 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

Protecting the Whistleblower

In two recent decisions the Labour Appeal Court has considered the requirements of the Protected Disclosures Act 26 of 2000, and the intention of the legislature when passing the Act, namely, to afford protection and encouragement to whistleblowers in the interests of accountable and transparent governance. In *Radebe & another v Premier, Free State Province & others* (at 2353) the court overruled an earlier judgment of the Labour Court (reported at (2009) 30 *ILJ* 1900 (LC)), finding that the court had erred in interpreting the Act too narrowly, and in ignoring the definition of 'employer' in the Act, which was wide enough to cover the disclosure of information relating not only to the conduct of an employer but also to that of its employees when acting in the course and scope of their employment. In order to afford protection to the whistleblower the Act also did not require that the information disclosed be factually accurate, but only that the employee making the disclosure should reasonably believe it to be true, and should act in good faith. In *State Information Technology Agency (Pty) Ltd v Sekgobela* (at 2374) the LAC applied a similar test and upheld as a protected disclosure an employee's disclosure to the Public Protector of information relating to his employer's alleged wrongdoing.

Retrenchment and Severance Pay

The trade union party in *Chemical Energy Paper Printing Wood & Allied Workers Union v Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics* (at 2386) failed to advise its members correctly during preretrenchment consultations with their employer, and as a result the members refused the employer's offer of alternative employment, and the employer refused to pay them severance pay after their retrenchment. In proceedings to challenge the fairness of their dismissals the Labour Court found that the union was not entitled to reintroduce the consultation process before the court after it had failed to raise those issues during the original consultations, and that on the evidence before the court the retrenchments were fair. However, as the employees had not been properly advised by their union they had not acted unreasonably by refusing the alternative employment offered, and were entitled to their severance pay.

Determining the True Employer

In *Dyokhwe v De Kock NO & others* (at 2401) an employer had purported to terminate its relationship with a permanent employee and to rehire his services through a temporary employment service (TES), with which the employee had signed a form of employment contract, and which the original employer maintained had therefore become his new employer by virtue of s 198 of the LRA 1995. After a protracted series of applications both to arbitration and to the Labour Court to determine which of the two entities was indeed the employee's employer, the court has now confirmed that the correct approach to the interpretation of s 198 is to have regard to the true relationship between the parties rather than to rely purely on the wording of s 198(2) or on the terms of the various contracts between them. The court found no evidence that the original employer had actively terminated the employee's services after his purported transfer and found that, since he continued to render his services to the original employer, the TES agreement was a sham to enable the employer to evade its responsibilities under the LRA 1995, and that the agreement was void *ab initio*. The original employer remained the true employer, and when it terminated the TES agreement it dismissed the employee. The court further found that in any event the TES had not procured the employee nor provided him to the client, as required by s 198, and that that section was therefore not applicable.

Contract of Employment

Johnson Matthey (Pty) Ltd v National Union of Metalworkers of SA & others (at 2420) concerned three employees who, after their retrenchment, obtained an arbitration order for their re-employment on the 'terms and conditions attached to their post on date of re-employment'. When required by their employer to join a particular medical aid scheme they applied to the Labour Court for a declarator that they were not compelled to do so as they had not been members of the scheme during their past employment. The court found that by accepting re-employment the employees were bound by the employer's terms and conditions, which at the date of re-employment included membership of the scheme in question, and ordered that they join the scheme.

Insolvency and Termination of Employment

When his employer was provisionally liquidated the third respondent employee in *Van Zyl NO & others v Commission for Conciliation, Mediation & Arbitration & others* (at 2471) was notified of his impending dismissal. He referred an unfair dismissal dispute to arbitration and obtained an award of compensation. The provisional liquidators sought to review that award on the ground that his contract had been suspended by operation of law in terms of the Insolvency Act 24 of 1936. After considering the terms of s 38(9) of the Act, together with the provisions of 197B of the LRA 1995 relating to the automatic termination of employment contracts on insolvency, the Labour Court found that the liquidators had not complied with the requirements of those provisions and that the arbitrator had reasonably found that the employee had been dismissed.

Prescription

In three recent cases the Labour Court has considered the effect of the provisions of the Prescription Act 68 of 1969 on the enforceability of claims and awards in the field of labour law. In *Melane v G4S Security Services (Pty) Ltd* (at 2425) the court agreed to make a settlement agreement an order of court despite the applicant's delay of more than seven years in bringing the application. The court noted that the respondent had not raised the issue of prescription and found that the court itself could not do so of its own motion. In *SA Transport & Allied Workers Union on behalf of Hani v Fidelity Cash Management Services (Pty) Ltd* (at 2452) the court considered the effect of s 13(1) (*f*) of the Act where a dismissal dispute had been 'subjected to arbitration'. The court confirmed that prescription began to run in respect of an unfair dismissal claim as soon as the employee had obtained an award ordering his reinstatement. The employer's application to review the award did not interrupt prescription and was no impediment to an application by the employee to have the award made an order of court. Similarly, in *Sampla Belting SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 2465) the court found that the filing of a review application did not amount to an acknowledgment of liability on the part of the employer, and did not interrupt the running of prescription.

Constructive Dismissal

Granchelli and SA Revenue Service (at 2481) concerned an employee who resigned from his employment when his employer ignored his requests to accommodate his disability by transferring him to a less demanding position, and claimed that he had been constructively dismissed because his continued employment had become intolerable. The CCMA commissioner accepted the employee's claim of constructive dismissal and, unusually, granted his request for reinstatement, but subject to the proviso that he be placed in a suitable alternative position.

Dismissal — Misconduct during Protected Strike

The CCMA commissioner in Labour *Equity General Workers Union of SA on behalf of Sipho & others and Qutom Farm* (at 2499) upheld the dismissal for misconduct of employees who had blocked the main entrance to the employer's premises during the course of a protected strike, so prejudicing the conduct of the employer's business.

Illegal Money-lending

An employee who engaged in lending money illegally to fellow employees was held in *Transport & Allied Workers Union of SA on behalf of Tjotolo and Bokoni Platinum (Pty) Ltd* (at 2506) to have been correctly dismissed for misconduct. The CCMA commissioner did not accept the employee's statement that he only conducted his business from home and after working hours, and found that by charging usurious rates and obtaining garnishee orders over his fellow employees' salaries he had adversely affected their morale and work performance, so disrupting his employer's business.

Collective Agreements — Interpretation and Application

In *Transport Action Retail & General Workers Union and Blue Waters Hotel* (at 2514) the parties entered into a settlement agreement in respect of an organizational rights dispute which had been referred by the union to the CCMA. It then referred a second dispute to arbitration concerning the correct interpretation of the settlement agreement. After examining the terms of the agreement the CCMA commissioner found that the only part of the original dispute that had been settled was that relating to the grant of stop-orders. It was not recorded that the agreement was in full and final settlement of the entire dispute that had originally been referred, and the union was not precluded from pursuing a dispute over other aspects such as its right of access.

In National *Union of Democratic & Progressive Workers on behalf of Malunga & another and Vector Textiles* (at 2523) the arbitrator had to consider the implications of a clause in a collective agreement which effectively permitted an employer to place its employees on short-time for an indefinite period. As this would be manifestly unfair and contrary to the spirit and purpose of the LRA 1995, he found that it was an implied term of the main agreement that the short-time would be of limited duration, and concluded that 30 calendar days would be a reasonable period.

Practice and Procedure

The Labour Court refused to uphold a plea of res judicata in *Mlambo v Safety & Security Sectoral Bargaining Council & others* (at 2427), in which a bargaining council arbitrator had initially ruled that he had jurisdiction to determine a dispute but, after hearing evidence, had decided that he did not. The court found that the initial ruling was merely provisional and made for purposes of convenience, and that it was not finally binding on the arbitrator. In *Pienaar v Stellenbosch University & another* (at 2445), when certifying that a dismissal dispute remained unresolved the conciliating commissioner had incorrectly indicated that the matter should be referred to the Labour Court for arbitration. Relying on that certificate the applicant's attorney referred the matter to the court by notice of motion. The court refused to accept jurisdiction, pointing out that the conciliation certificate merely recorded that the case remained unresolved and had no other legal or jurisdictional consequences. The court referred the matter to the CCMA for arbitration and expressed some criticism of the way in which the attorney had handled it.