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Dear *Industrial Law Journal* Subscriber,

We take pleasure in presenting the November 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

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Kind regards

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HIGHLIGHTS FROM THE INDUSTRIAL LAW REPORTS

Notice of Strike Action

By a majority of five members to four the Constitutional Court has now in *SA Transport & Allied Workers Union & others v Moloto NO & another* (at 2549) overruled the earlier decision of the Supreme Court of Appeal in *Equity Aviation Services (Pty) Ltd v SA Transport & Allied Workers Union & others* (2011) 32 *ILJ* 2894 (SCA) in which the court ruled that non-unionized employees were required to give separate notice of their intention to join protected strike action initiated by a majority trade union on behalf of its members. The SCA had found that the purpose of the requirement to give notice of strike action contained in s 64(1)(*b*) of the LRA was to warn the employer of the power play to follow to enable it to make informed decisions, and that a failure by non-union employees to give notice would lead to chaotic collective bargaining. On appeal, the majority in the CC noted that s 64(1)(*b*) contains no express requirement that every employee who intends to take part in a protected strike must personally give notice, nor that the strike notice must indicate who will take part. The court held that the right to strike is protected as a fundamental constitutional right without any express limitation, and that it should not be cut down by reading implicit limitations into it. The court also noted that in the case before it, the union and the employer had entered into a recognition agreement in terms of which the union was the recognized bargaining agent on behalf of all employees, whether union members or not, and that the employer could not have been under the impression that the strike notice related only to union members. The majority decision of the Labour Appeal Court on the issue (see (2009) 30 *ILJ* 1997 (LAC)) has thus been restored.

Discrimination on the Grounds of Age

The Labour Appeal Court has also in *Karan t/a Karan Beef Feedlot v Randall* (at 2579) overturned an earlier decision in which the Labour Court found that an employer had unfairly discriminated against its employee on the grounds of age when it agreed that he should remain in its employment after reaching his agreed retirement date, but later gave him unilateral notice of his retirement. The LAC noted that, in its letter agreeing to continue employing the employee's services after the agreed date, the employer had stipulated that it could later determine on notice when the employer should retire. The court found nothing unlawful or unfair in this arrangement, which had been accepted by the employee as part of the agreement, and that the employer was entitled to determine the later retirement date unilaterally on notice.

Other Strike Issues

In *Harmony Gold Mining Co Ltd (Target Mine) v National Union of Mineworkers & others* (at 2609) the Labour Court granted an order interdicting strike action by mine employees who sought to change the practice of 'belt riding' as a means of transporting them to and from work in the mine. The court found the practice to be a condition of their employment governed by a collective agreement and that they were precluded from striking over the issue during the currency of the agreement. Similarly, in *Mega Express (Pty) Ltd v Employees as Listed* (at 2634) the court granted the employer party an urgent interdict to prevent its employees taking from strike action where the issues in dispute were governed by a collective agreement and the employees were union members at the time the agreement was entered into. The court in *National Union of Metalworkers of SA on behalf of Members v Murray & Roberts Projects (Pty) Ltd* (at 2642) considered the provisions of s 68(2) of the LRA and refused to grant an urgent application by the union party to declare a lock-out by the employer to be unprotected. The court found that the union had not given 48 hours' notice of its urgent application, as required by s 68(2), and that this factor impacted unfairly on the employer's ability to come to court properly prepared to oppose the

granting of relief. In *Passenger Rail Agency of SA v SA Transport & Allied Workers Union & others* (at 2659) the union party instituted strike action on the basis of two demands, the first for the suspension of the applicant's CEO and head of security, and the second for a forensic investigation into possible misconduct. The court granted the employer interim relief and on the return date found the first demand to have been unlawful, and that the second had been substantially complied with.

Employment of Refugees

Ndikumdavyi v Valkenberg Hospital & others (at 2648) concerned a formal refugee whose employment at the respondent hospital was terminated because, as a non-citizen, his permanent employment was prohibited by statute and his refugee status was shortly to expire. The Labour Court nevertheless recognized his status as an employee in terms of the LRA and, in response to the argument that his contract of employment was void *ab initio,* held that the contract should be read, not in the strict sense, but to mean the wider term 'employment relationship'. He had thus been dismissed, and the dismissal was found to be procedurally unfair. In *Mujiriro & others and Stallion Security (Pty) Ltd* (at 2713) refugees seeking asylum obtained work as security officers on the basis of forged registration documents. When they were dismissed for contravention of the Private Security Industry Regulation Act 56 of 2001, the arbitrating commissioner found that their employer had been complicit in their misconduct, and that they were entitled to protection as vulnerable members of society, regardless of the illegality of their contracts, and awarded them compensation for unfair dismissal.

Contract of Employment Requirements

The Labour Court was required in *Southgate v Blue IQ Investment Holdings* (at 2681) to consider the essential requirements necessary for the formation and alleged subsequent early termination of three successive fixed-term employment contracts, in order to determine whether the respondent company had prematurely breached or repudiated the contractual relationship between itself and the applicant employee. The court found that it was not necessary for the final contract to be reduced to writing to become effective, and that the applicant was entitled to assume that the company CEO was duly authorized to conclude the final contract, so rendering the company liable for damages for breach of contract when it failed to give effect to it.
In *Hlatshwayo & others and Kwadukuza Municipality* (at 2721), in which the members of a rural community had been employed on a rotational basis on a series of two-week contracts and had then been told that their services were no longer required, the arbitrator found that their employment had to be regarded as for an indefinite period, and that they had been unfairly dismissed.

Deregistration of Trade Union

The Labour Court had, in an appeal in terms of s 111 of the LRA, upheld the Registrar of Labour Relations' decision to cancel the registration of the appellant union (see (2011) 32 *ILJ* 1372 (LC)). The Labour Appeal Court, in *National Entitled Workers Union v Ministry of Labour & others* (at 2585), confirmed this decision, finding that the union had clearly conducted its activities solely or mainly for the benefit of a few people, particularly its president, and that this was the kind of organization the drafters of the LRA had in mind when they empowered the registrar to deregister such a union so as to deny it the protections of the LRA.

Local Government: Disciplinary Regulations for Senior Managers 2010

In the wake of three recent decisions in which the Labour Court considered and interpreted the wording of regulation 6 of the above regulations (see (2012) 33 *ILJ* at 598, 642 and 653 (LC)) the court agreed in *Lebu v Maquassi Hills Local Municipality & others* (3) (at 2623) to grant an interdict to prevent the respondent municipality from proceeding with disciplinary action against a senior manager until the chairperson of the disciplinary enquiry had been properly appointed in compliance with the regulations.

Unfair Labour Practice Relating to Promotion

An SSSBC bargaining council arbitrator had found that, if the employer had not promoted the preferred candidate who had failed to disclose his disciplinary record, the employee would have been promoted and that this constituted an unfair labour practice. On review the Labour Court found that the non-disclosure and its consequences were not material as they had not affected the employee's opportunity for promotion. On appeal, the Labour Appeal Court, in *Noonan v Safety & Security Sectoral Bargaining Council & others* (at 2597), held that the court below's finding downplayed the value of process; lent support to possible dishonest practices; devalued the role of the selection panel; prejudiced the employee; enabled the successful candidate to rise through the promotion process; and ignored the employer's failure to verify the candidate's suitability for the post. This was all manifestly unfair, and the employee was awarded compensation for the unfairness.

In *Public Servants Association on behalf of Tlowana v MEC for Agriculture & others* (at 2675) the Labour Court granted compensation to a public service employee whose promotion had been delayed when the employer appointed instead, an unqualified candidate to the promotional post, who did not have the essential requirements for the job, and who should not have been shortlisted. In *SA Police Union on behalf of Buckus and SA Police Service,* (at 2755), in which a police officer complained of being passed over for promotion, the arbitrator found that the selection panel had failed to comply with the applicable National Instruction, and awarded compensation for the procedural unfairness.

Interpretation and Application of Collective Agreements

The bargaining council arbitrator in *Independent Municipal & Allied Trade Union on behalf of Strydom and Nelson Mandela Bay Metropolitan Municipality* (at 2733) had to consider whether he had jurisdiction to arbitrate a dispute purportedly referred to him in terms of s 24 of the LRA as concerning the interpretation and application of a clause in the SALGBC main collective agreement. The arbitrator found that the dispute, which concerned a grievance raised by an employee, did not involve the interpretation of the agreement, and that he lacked jurisdiction to arbitrate. Section 24 disputes could not be used as a 'catch-all' provision to vest councils with a jurisdiction they did not otherwise enjoy. In *Lempe and Kroon Gietery & Staal* (at 2738) the parties entered into a limited duration agreement in contravention of the terms of the main collective agreement of the MEIBC. When the employee claimed a reasonable expectation of the renewal of the contract the arbitrator found that he had proved no such expectation, and that the arbitrator could not substitute the limited duration contract with a permanent contract, as prescribed by the collective agreement. The claim was dismissed.

Retrenchment

The employer party in *Rhode and Amsteele Systems (Pty) Ltd* (at 2749) discussed alternatives to retrenchment with an employee selected for retrenchment but declined to implement 'vertical bumping' by offering him employment at a lower level, citing its BEE requirements, which were necessary to secure contracts in the construction sector. The arbitrator found BEE to constitute a fair and valid criterion for

selection, and that the proposed retrenchment was fair. Alternatives to retrenchment were also considered in *National Union of Metalworkers of SA on behalf of Mthambo and Pro Roof Steel Merchant* (at 2742) in which the arbitrator found that there was a bona fide economic rationale for the employee's retrenchment, that the parties had consulted and that the retrenchment was fair.

The Review of Arbitration Awards

In *Vodacom (Pty) Ltd v Byrne NO & others* (at 2705), the Labour Court again had regard to the factors to be taken into account when considering whether a commissioner's decision fell within the band of decisions to which a reasonable decision maker could come for the purposes of review. The court found that the commissioner's finding, namely, that to call another person a racist, when they were not, was not in itself racist behaviour, represented a conclusion to which a reasonable person could come, and was not reviewable.

Quantifying Compensation for Unfair Dismissal

In review proceedings, the Labour Court in *Plasticwrap—A Division of CTP Ltd v Statutory Council for the Printing, Newspaper & Packaging Industry & others* (at 2668) considered the factors that should correctly be taken into account by an arbitrator when quantifying compensation for an unfair dismissal in terms of s 194(1) of the LRA. The court found that, by taking into account mitigating factors normally taken into account after establishing guilt, the arbitrator had adopted an incorrect approach. Compensation should be a payment to offset financial loss resulting from an unfair dismissal.

Practice and Procedure

In *Harmony Gold Mining Co Ltd (Target Mine) v National Union of Mineworkers & others* (at 2609) the Labour Court considered when it should allow the introduction of new matter in an answering affidavit, and allowed the introduction of new material which merely supported or amplified the case already made out in the employer's founding affidavit, and did not support any new cause of action.

Quote of the Month:
Maya AJ in *SA Transport & Allied Workers Union & others v Moloto NO & another* (2012) 33 *ILJ* 2549 (CC):

'Although strikes are generally intended to impose a punitive cost on an employer in order to force its hand and achieve a desired goal, the striking employees themselves and the public too suffer the brunt of the disruption. The volatility of industrial action must, therefore, rank highly among the issues that the Act's primary objects, of promoting orderly collective bargaining and effective resolution of labour disputes, seek to address. It is well to remember the Act's purposes, amongst others, to achieve peaceful labour relations in an orderly, democratic workplace and a thriving economy and that the right to strike is also an extension of the collective bargaining process. An interpretation that results in chaos and disturbs the desired balance of labour relations that is fair to both employees and employers is untenable.'