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Dear *Industrial Law Journal* Subscriber,

We take pleasure in presenting the December 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.

Please accept our best wishes for a safe and relaxing festive season and a prosperous 2013.

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

Pension Benefits and Set-offs

In both *Boshoff v Iliad Africa Trading (Pty) Ltd t/a Builders Market Welkom* (at 2785) and *Gradwell v Bidpaper Plus (Pty) Ltd & others* (at 2794) the High Court was required to consider whether and when a pension fund might be entitled in terms of s 37D of the Pension Funds Act 24 of 1956 to withhold pension or provident fund benefits due to an employee by way of set-off against judgment debts owing by the employee to the employer. In both cases the court noted that the provisions of s 37D do not cover all judgment debts but are exclusively reserved for employers who can show that they are the legitimate victims of specific dishonourable workplace transgressions by their employees. In *Boshoff* the court held that an employer was not entitled to recover from an employee's pension fund, a pure commercial debt due by the employee, not arising from his employment but in his capacity as surety and co-principal debtor for a customer of the employer company. In the *Gradwell* case, in which an employer instituted action against a former employee for damages for breach of a restraint of trade agreement, the High Court found that the pension fund was entitled to retain benefits due to the employee pending the finalization of the employer's civil action, since the breach of restraint of trade, if proved, would imply serious misconduct and dishonesty on the part of the employee.
Rank Sharp SA (Pty) Ltd v Kleinman (at 2932) also concerned the question of set-off, but in the context of a settlement agreement in which the employer sought to set off an amount allegedly due to it under an employee's loan, against a settlement agreement for the payment of severance pay. The Labour Court considered the requirements for set-off to operate, but found that the debts were not owing between the parties in the same capacity, and that the loan account was not liquidated and capable of set-off against the agreement.

CCMA Rule Held to be Unconstitutional

In *Law Society of the Northern Provinces v Minister of Labour & others* (at 2798) the High Court granted an order declaring rule 25(1)(*c*) of the CCMA Rules, which limits the right of litigants to be legally represented in arbitrations involving the dismissal of employees for misconduct or incapacity, to be inconsistent with the Constitution and invalid. The court found the limitation of that right only in respect of dismissals for those specific reasons to be irrational and arbitrary. It could not accept the CCMA's contention that disputes involving dismissal for those reasons were necessarily less serious or complex than disputes in other matters, nor its complaint that to permit legal representation in such cases would significantly add to its workload and impair its efficiency. The declaration was suspended for 36 months to enable the parties to consider and promulgate a new rule.

CCMA and Bargaining Council Jurisdiction

On appeal the Labour Appeal Court has in *Phera v Education Labour Relations Council & others* (at 2839) confirmed the earlier finding of the Labour Court (reported at (2010) 31 *ILJ* 992 (LC)), in which that court held that where, in arbitration proceedings a jurisdictional point is raised, the arbitrator must require the party alleging jurisdiction to prove that fact before considering the merits. On the facts before him the arbitrator had correctly found that he lacked jurisdiction to consider an alleged unfair labour practice dispute because the applicant had failed to show that his employment had been duly approved, so there was no employment relationship on which to ground jurisdiction.

Labour Court Jurisdiction

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The Labour Court held in *Goussard v Impala Platinum Ltd* (at 2898) that a claim for contractual and delictual damages arising from an unfair dismissal was bad in law, and that it lacked jurisdiction to hear such a dispute. Remedies for unfair dismissal were confined to those provided for in the
LRA 1995 and the BCEA 1997. It found further that the employee could not bypass the LRA and rely directly on s 23of the Constitution without challenging the constitutionality of the LRA, and that a claim based on s 23was also bad in law.

Dismissal—When an Appropriate Penalty

The Labour Appeal Court has in *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others* (at 2812) endorsed an earlier Labour Court judgment (reported at (2011) 32 *ILJ* 923(LC)) in which that court upheld a commissioner's finding that dismissal was not an appropriate penalty for an employee who had absented herself from work without leave in order to complete her training and initiation as a sangoma. The LAC held that the employee did not require a medical certificate in terms of s 23 of the BCEA 1997 to justify her absence as she was not 'sick' in the conventional sense, but in a 'condition' which, according to her traditional beliefs, required her to undergo the training to comply with a calling from her ancestors. When refused unpaid leave the employee chose to obey her ancestors. The court rejected the argument that the commissioner's finding would 'open the floodgates to malpractices' in the workplace and expressed the view that such cultural beliefs should not be trivialized, but should be reasonably accommodated.

In *Choene v Mitsui & Co Southern Africa (Pty) Ltd* (at 2872) the Labour Court held dismissal to be an appropriate penalty where an employee had a long history of unexplained absences from work and a history of alcohol abuse. However, it found the dismissal process to have been procedurally unfair because he was not fully advised of the charges against him, nor afforded the right to representation at his disciplinary hearing. On review the Labour Court upheld a commissioner's finding in *SA Breweries Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 2945) that dismissal for drinking on duty was too harsh a penalty in the circumstances of the particular case. Similarly, in *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry & others* (at 2985) the court upheld an arbitrator's finding that dismissal for reporting for work still under the influence of alcohol where the employee was merely a general worker was excessively harsh and progressive discipline would have had the desired outcome.

Temporary Employment Services

The Labour Appeal Court upheld an earlier judgment of the Labour Court in *National Union of Metalworkers of SA & others v Abancedisi Labour Services CC* (at 2824), in which the client of a labour broker refused to allow the broker's employees onto its premises after they embarked on unprotected industrial action. The employees claimed before the Labour Court that the client's actions amounted to an automatically unfair dismissal by the broker. The LAC distinguished the decision of the Labour
Court in *Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) 31 *ILJ* 2120 (LC), in which it was held that a labour broker was entitled to resist an unlawful demand by its client to remove its employees. In the present case the removal was for a fair reason, and further the broker had not dismissed
the employees but recognized that it had to find them other assignments or retrench them. The applicant union's referral to court was held to be premature. In *Chirowamhangu and Ramfab Fabrications (Pty) Ltd* (at 3002) the arbitrator considered the true relationship between the parties in a matter concerning an employee, a labour broker and the broker's client, and found the client to be the true employer. The broker was merely the conduit for the payment of the employee's wages.

Interpretation and Application of Collective Agreements

The Labour Court granted a final interdict to prevent the union party in *Cape Clothing Association v SA Clothing & Textile Workers Union & another* (at 2863) from resorting to strike action over what it claimed amounted to a unilateral change to its members' terms and conditions of employment. The court found that the real issue in dispute between the parties concerned the correct interpretation of the terms of the main industrial agreement governing the amount of annual leave pay due to employees. The union was not entitled to take strike action over its own interpretation, and the matter had to be referred to arbitration in terms of s 24 of the LRA 1995. In *SA Medical Association on behalf of Meyer-Van den Heever & another v University of Limpopo* (at 2954) the Labour Court found that the respondent had unilaterally changed its employees' entitlement to maternity leave from paid to unpaid leave, and ordered the specific performance of their condition of employment.

In both *Independent Municipal & Allied Trade Union & another and Ekurhuleni Metropolitan Municipality* (at 3009) and *Independent Municipal & Allied Trade Union on behalf of D'Oliviera and Buffalo City Municipality* (at 3019) the arbitrator was required to determine issues arising from the interpretation and application of collective agreements concluded under the auspices of the SA Local Government Bargaining Council. In the *Ekurhuleni* matter the arbitrator found that, where a collective agreement restricted the right of certain categories of management to become shop stewards, and where those categories had to be determined by a division of the SALGBC, the municipality had breached the agreement by purporting to pre-empt the council's decision and to decide for itself which categories were excluded. In the *Buffalo City* case, the arbitrator found that the municipality was obliged to seek condonation for failing to comply with the time-limits prescribed in its disciplinary code, which formed part of a collective agreement, when bringing disciplinary charges against an employee.

Striking Shop Stewards

In *SA Municipal Workers Union on behalf of Members v Ekurhuleni Metropolitan Municipality* (at 2961) the Labour Court ruled that full-time shop stewards who continued to render their services to their union during the course of a strike were entitled to payment of their salaries, and that the principle of no work, no pay during strike action did not apply to them.

Unfair Labour Practices — Benefits

In *SA Post Office Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 2970) the Labour Court reconsidered the apparently conflicting case law on the ambit of unfair labour practices, and in particular, whether an 'acting allowance' paid to an employee while serving in a more senior position constituted a 'benefit' as defined in s 186(2)(*a*) of the LRA. The court found that to claim the right to an acting allowance an employee had to show a right arising either *ex lege* or *ex contractu.* Only once that right was established did a commissioner have jurisdiction to entertain an unfair labour practice in terms of s 186(2)(*a*). The arbitrator in *SA Municipal Workers Union on behalf of Meyer and City of Cape Town* (at 3030) ruled that a scheme whereby the employer undertook to pay for certain costs incurred by employees who used their own vehicles for work could give rise to a claim for unfair labour practice for the purposes of s 186(2)(*a*). He disagreed with the finding of the arbitrator in *Independent Municipal & Allied Trade Union on behalf of Pregnolato & others and City of Cape Town* (2012) 33 *ILJ* 1984 (BCA), taking the view that the question was not whether the allowance was remuneration or a benefit, but whether the employer had acted fairly in respect of an advantage to which the employee was entitled *ex lege* or *ex contractu.*

Unfair Discrimination

The applicants in *Ngcobo & others v Chester Butcheries* (at 2932) claimed that their employer had unfairly discriminated against them by failing to pay them an annual bonus after they took part in a protected strike. The Labour Court found that the onus initially rested on the employees to show that they had been subjected to differential treatment for taking part in the strike, and that they had not established a *prima facie* case that required the employer to answer it.

Automatically Unfair Dismissal

The Labour Court found in *De Klerk v Cape Union Mart International (Pty) Ltd* (at 2887) that s 187(1)(d) of the LRA should be given a purposive interpretation, and should include dismissal for exercising a right in terms of an employer's grievance policy. In *Choene v Mitsui & Co Southern Africa (Pty) Ltd* (at 2872) the court found that, where an employee had shown no evidence to support his alleged dismissal for reasons of HIV, his dismissal was not automatically unfair. In *Memela & another v Ekhamanzi Springs (Pty) Ltd* (at 2911) the Labour Court held the employer party responsible for the automatically unfair dismissal of two of its employees who were denied access to its landlord's premises on the grounds that they had become pregnant outside wedlock, which contravened the landlord's code of conduct for those working on its premises. The employer had a duty to protect its employees from the actions of its landlord. The dismissal of employees who were retrenched while taking part in a national strike was held in *National Union of Metalworkers of SA on behalf of Maifo & others v Ulrich Seats (Pty) Ltd* (at 2918) not to have been automatically unfair. The Labour Court found that the main reason for their dismissal was not their strike action but the employer's serious economic difficulties which provided a valid reason for their retrenchment. The dismissals were, however, found to be procedurally unfair because the employer did not consider alternatives to retrenchment nor apply fair selection criteria.

Retrenchment and Severance Pay

The commissioner in *Fourie and Compass Group SA (Pty) Ltd t/a KKS* (at 2995) found that an employee who, after her retrenchment, had obtained employment elsewhere with the assistance of her manager, who was retrenched at the same time, had not done so with the employer's assistance and was entitled to severance pay in terms of s 41(4) of the BCEA 1997.

Reinstatement After Unfair Dismissal

The applicant in *Tshongweni v Ekurhuleni Metropolitan Municipality* (at 2847) was found by the Labour Court to have been substantively unfairly dismissed, and was awarded limited compensation equal to the unexpired term of his fixed-term contract. On appeal the Labour Appeal Court considered the general rule that, in cases of substantively unfair dismissal, reinstatement was the primary remedy. This was only available where the employee was willing to make his services available. In the case before it the employee did not wish to be reinstated but was seeking his salary for the whole period during which he was subsequently unemployed. The court dismissed his appeal, finding that such a claim amounted to a claim for damages, which was not provided for in the LRA 1995.

Practice and Procedure — Joinder

The Labour Court found it unnecessary in *Strydom v T-Systems SA (Pty) Ltd* (at 2978) where, after the transfer of a business as a going concern, the new employer retrenched a transferred employee, for the employee to join the old employer as a party to proceedings for the payment of severance pay. The court found that the old employer, although having a financial interest in the relief sought, had no direct and substantial interest in the rights at stake in the proceedings. Any ruling on the issue of severance pay would not affect the new employer's right to claim a contribution from the old employer in separate proceedings.

Quote of the Month:

Tlaletsi JA in *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others* (2012) 33 *ILJ* 2812 (LAC):

'It would be disingenuous of anybody to deny that our society is characterized by a diversity of cultures, traditions and beliefs. That being the case, there will always be instances where these diverse cultural and traditional beliefs and practices create challenges within our society, the workplace being no exception. The Constitution of the country itself recognizes these rights and practices. It must be recognized that some of these cultural beliefs and practices are strongly held by those who subscribe to them and regard them as part of their lives. Those who do not subscribe to others' cultural beliefs should not trivialize them by, for example, equating them to a karate course. What is required is reasonable accommodation of each other to ensure harmony and to achieve a united society.'

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