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Dear *Industrial Law Journal* Subscriber,

We take pleasure in presenting the January 2013 issue of the monthly *Industrial Law Journal Preview*, authored by the editors of the *ILJ*: C Cooper, A Landman, C Vosloo and L Williams - de Beer.

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

HIGHLIGHTS FROM THE INDUSTRIAL LAW REPORTS

Inherent Jurisdiction of the High Court

The High Court was approached in *Mbanjwa v Head of Department: Public Works, Roads & Transport, NorthWest Provincial Government & another* (at 87) to grant an interim order interdicting the respondents from proceeding with a disciplinary enquiry against the applicant, pending an application for a final interdict to be launched in the Labour Court. The court found that although the Labour Court had exclusive jurisdiction to grant final orders in such matters, this did not oust the High Court's inherent interim jurisdiction, and granted the order. In the court's view its interim jurisdiction aided access to justice for litigants who found themselves far removed from a seat of the Labour Court.

Evidence and Piercing the Corporate Veil

In *Bargaining Council for the Furniture Manufacturing Industry, KwaZulu-Natal v UKD Marketing CC & others* (at 96) the respondent business had restructured its operations by setting up a number of separate entities, which then attempted to register with the appellant bargaining council. The council refused to register them, considering the set-up to be a sham. On appeal, the Labour Appeal Court considered when a court would be justified in 'piercing the corporate veil' in proceedings concerning a number of corporate entities. The court found that it would only be entitled to do so where the evidence showed that the separate entities had been set up merely as a device to avoid the consequences of an employment relationship with the various employees, and that in the case before it this had not been shown. It also considered when a party's failure to give evidence in court proceedings would give rise to an adverse inference against it. It found that the appellant council's evidence on the matter had been at best equivocal, and would not draw an adverse inference from the respondent's failure to give evidence in the court below.

Retrenchment

The Labour Appeal Court reiterated in *Super Group Supply Chain Partners v Dlamini & another* (at 108) the obligations imposed on employers in terms of s 189 of the LRA 1995 when contemplating retrenchments, and found that, while the employer party had valid operational reasons to embark on a restructuring exercise, its failure to consult on selection criteria, and instead to place the onus on employees to ensure that consultation took place, had rendered the retrenchment substantively unfair.

Strikes and Strike Issues

In *Air Chefs (Pty) Ltd v SA Transport & Allied Workers Union & others* (at 119) the parties had entered into a recognition agreement in terms of which they agreed to reach a further agreement providing for a danger allowance, but they did not regulate how the matter should be addressed if no such further agreement was reached. When negotiations between the parties broke down, the union gave notice of proposed strike action over the issue. The Labour Court held that the issue was not regulated by a collective agreement in terms of s 65(3)(*a*)(i) of the LRA 1995 because the parties had not reached an agreement on the process to be followed in the event of a failure to reach agreement. The matter was therefore capable of being resolved by industrial action and the proposed strike would be protected.

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Dismissal for Dishonesty

On review the Labour Court in *Independent Newspapers (Pty) Ltd v Media Workers Union of SA on behalf of McKay & others* (at 143) set aside a CCMA award reinstating an employee who had been dismissed for dishonesty after accessing the employer's confidential information, and who had rejected the employer's offer of continued employment subject to certain conditions. The court found that the commissioner had failed to appreciate that when the employer's offer was rejected the trust relationship had been destroyed, and that he had failed to apply his mind to the severity of the employee's dishonest conduct.

Polygraph Testing as a Tool When Selecting Employees for Promotion

In *Sedibeng District Municipality v SA Local Government Bargaining Council & others* (at 166) a municipality required employees who had been shortlisted for promotion to undergo both competency and polygraph tests, and eliminated those who had failed the polygraph tests. A bargaining council arbitrator found that this amounted to an unfair labour practice, and awarded the employees compensation. On review, the Labour Court agreed with the municipality that polygraph testing may be used as a legitimate tool when considering candidates for promotion, but found that exclusive reliance on the results of such tests to eliminate candidates was, in the absence of other independent evidence implicating their integrity, unfair.

Disciplinary Code and Procedure

On review the Labour Court had to consider in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 179) when an employer would be entitled to hold a second enquiry into an employee's misconduct, in circumstances where the employee had already been issued with a written warning by his manager. It appeared that the issuing of a warning amounted to a deviation from the employer's disciplinary policy, which required that the employee face a formal disciplinary hearing for a serious offence, and that the manager issuing the warning had not notified the employer of this deviation. The court found that although that failure did not render the warning invalid per se, it did deprive the employer of an opportunity to use the prescribed regulating mechanism, and that in the circumstances it was fair for the employer to hold a fresh enquiry.

Jurisdiction of the CCMA

In *Marx & others and Servest Group (Pty) Ltd t/a Servest Hygiene* (at 196) the CCMA commissioner found that he lacked jurisdiction to arbitrate a dispute in which the employees claimed that they had been constructively dismissed after their employer had reduced their sales commission. The commissioner found that he had to determine the true nature of the dispute irrespective of its characterization by the referring party, and that the dispute was in reality a dispute of interest which should be the subject of power-play, not arbitration. In *Sefolo and Tshwane University of Technology* (at 211) the commissioner ruled that he had jurisdiction to arbitrate an unfair labour practice dispute in which the employee claimed that he had been subjected to an occupational detriment for having made a protected disclosure as contemplated in the Protected Disclosures Act 26 of 2000. The commissioner rejected the employer's argument that the matter fell within the exclusive jurisdiction of the Labour Court, and found that s 191(13) of the LRA merely provides that an employee has an election to refer the dispute to the Labour Court in such cases.

Termination of Footballer's Contract — Breach or Variation?

The arbitrator in *Ngulube and Carara Kicks Football Club* (at 247) had to consider whether a footballer's contract of employment had been terminated by tacit agreement between the parties, notwithstanding an express clause in the contract requiring that any variation be reduced to writing and signed by the parties. The arbitrator rejected the club's argument that the contract could be varied informally and confirmed that to prove a tacit agreement the conduct or circumstances relied on must be so unequivocal that the parties must have been satisfied that they were in agreement. He found on the facts that the club had proved no tacit agreement to terminate, and that it was in breach of the player's contract of employment.

Reinstatement after Constructive Dismissal

After finding on the evidence that the employee party had proved that he had been constructively dismissed, the bargaining council arbitrator in *Gordon and Western Cape Education Department* (at 218), unusually, granted his request for reinstatement. The employee, who was suffering from ill health, had resigned after his employer had unreasonably delayed in processing his application for temporary incapacity leave and had made unjustified deductions from his salary. Although recognizing that a claim for reinstatement was usually destructive of a claim for constructive dismissal, the arbitrator found that the employee would not be subject to the same conditions that prevailed before his resignation, and that his health had improved. There were therefore no bars to reinstatement.

Unfair Labour Practices— Promotion

In both *Peteni and SA Police Service & another* (at 228) and *Police & Prisons Civil Rights Union on behalf of Dhanarajan and SA Police Service & others* (at 235) the arbitrator found the failure by the SAPS to appoint applicants to promotional posts to amount to an unfair labour practice. In the *Peteni* case the national commissioner had issued a directive that did not comply with the Employment Equity Act 55 of 1998 nor with national instructions, and which was ultra vires. In *Dhanarajan* the candidates who were appointed did not meet the minimum or additional requirements for the position. The arbitrator found that the applicant's CV should have been taken into account throughout the evaluation process, not merely at the shortlisting stage. In both cases the unsuccessful candidates were granted protective promotion.

Application for Leave to Appeal

When considering an application for leave to appeal against an award of costs, the Labour Court in *Masuku v Score Supermarket (Pty) Ltd & others* (at 147) considered the test for interference with a court's discretionary decision on appeal, as stated in *National Union of Metalworkers of SA & others v Fibre Flair CC t/a Kango Canopies* (2000) 21 ILJ 1079 (LAC) and, being convinced that it had not committed any of the misdirections listed in that case, refused the application.

Exemptions from Bargaining Council Agreements

The applicant bargaining council in *National Bargaining Council for the Clothing Manufacturing Industry (Cape) & others v Zietsman NO & others* (at 151) sought to review a decision by its independent exemptions body to grant an exemption from its agreements where the employer seeking the exemption was in arrears with various payments due. The Labour Court noted that such a decision amounts to administrative action in terms of PAJA 2000, and is also subject to review under s 158(1)(*g*) of the LRA.

The court further noted that a clause in the council's main agreement stipulated that an applicant for exemption should satisfy the independent exemptions body that it was not in arrears or that an agreed payment plan existed for any payments due. The court found that this was a jurisdictional fact which had to exist before the body could exercise its power to grant an exemption, and that in disregarding that clause the independent exemptions body had exceeded its powers.

Estoppel

After their retrenchment the employee parties in *Capstick-Dale & another v Sustainable Fibre Solutions (Pty) Ltd* (at 129) referred a dispute to the CCMA, specifically relying on s 41(2) of the BCEA 1997 for a claim for severance pay, and disavowing any reliance on s 197 of the LRA 1995. When that claim was unsuccessful they referred a further claim for severance to the Labour Court, this time relying on s 197. The court held that they were estopped from doing so. Having made their election before the CCMA they were bound by it and could not later change their minds to the prejudice of their employer.

Practice and Procedure

In *February v Envirochem CC & another* (at 135), in which the applicant employee had made urgent application to the Labour Court for an order of specific performance in terms of an alleged oral agreement with her employer, the court considered the requirements for granting urgent and final relief, and found that the employee had not proved urgency nor that she would suffer irreparable harm. Furthermore, noting that the employee had also issued summons in the High Court claiming damages for the employer's breach of the same alleged oral agreement, the court upheld the employer's plea of lis alibi pendens.