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Dear *Industrial Law Journal* Subscriber,

We take pleasure in presenting the February 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

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HIGHLIGHTS FROM THE INDUSTRIAL LAW REPORTS

Employer's Vicarious Liability in Deviation Cases

The Supreme Court of Appeal considered recent developments in the law regarding an employer's vicarious liability for the acts of its employees in deviation cases in *Minister of Defence v Von Benecke* (at 275), and held the applicant minister vicariously liable for the conduct of a member of the defence force who stole parts of an assault rifle and made them available for use in an armed robbery. The court found it to be no longer necessary, if the constitutional norms so dictate, to limit the employer's vicarious liability to those cases where the employee, although deviating from the course and scope of his employment, was still acting in furtherance of his employer's business. The constitutional position of the defence force, and the enormous potential for public harm inherent in the inadequate preservation and control of arms, required that it should not generally be able to avoid liability for the acts of those who it appointed to carry out those duties.

Termination of Employment by Operation of Law

In *Grootboom v National Prosecuting Authority & another* (at 282) the Labour Appeal Court upheld an earlier decision of the Labour Court in which that court found that the services of a public service employee who had been absent without leave for more than one month had been terminated by operation of law in terms of s 17(5)(*a*) of the Public Service Act (Proc 103 of 1994), and not by any decision of the employer that could be challenged in a court of law. The LAC considered the provisions of s 17(5), and found nothing in them to exclude their application if the employer was aware of the employee's whereabouts or if less drastic measures would suffice, nor that they accorded the employee any right to be heard before they applied.

Administrative Law — Public Service

Three years after the irregular promotion of two public service employees, the MEC party in *Khumalo & another v MEC for Education, KwaZulu-Natal* (at 296) applied to the Labour Court to review and set aside the irregular appointments, and the court granted the order requested. On appeal the Labour Appeal Court endorsed the finding of the court below that the two appointments had been made irregularly, but further found that the lower court had not appreciated that it had a discretion and was entitled to refuse to set the promotions aside in the interests of finality, pragmatism and practicality. The LAC considered the factors to be taken into account in the exercise of such discretion, in balancing the interests of those affected. While the MEC's three-year delay in bringing the review application, coupled with the potential prejudice to the two employees, suggested that the appeal be allowed, the court held that, to promote the principle of legality and certainty and the spirit of transparency and accountability, which had been undermined when the irregular appointments were made, the Labour Court's ruling should stand.

Fixed-term Contracts of Employment

The respondent in *SA Football Association v Mangope* (at 311) had claimed damages both at common law and in terms of the BCEA 1997 for the breach of his three-year fixed-term contract of employment, which was terminated prior to the expiry of an initial probationary period. The Labour Court upheld his claim and awarded damages equal to the salary he would have received over the three-year period. On appeal the Labour Appeal Court found that the employer had failed to establish either that the employee had not performed satisfactorily or was incompetent, and that it had accordingly repudiated the contract. However, the court noted that the onus of proving damages rests on the plaintiff in an action for damages. The employee was not entitled to damages for future loss where he had adduced no evidence to support his claim for the non-realization of future income. The amount awarded was accordingly reduced to the amount of the actual past damages which the plaintiff had proved he had suffered.

The employee in *Solidarity on behalf of Van Niekerk v Denel (Pty) Ltd (Denel Dynamics)* (at 435) worked in a temporary position on a number of consecutive fixed-term contracts. The employer's conditions of employment for temporary employees provided that they were obliged to convert to standard conditions of employment once they had been employed for more than 24 months. The Labour Court found that this entitled the employee to be appointed indefinitely as a permanent employee after 24 months' service. In *Mlawuli and Computek (Pty) Ltd* (at 450) the commissioner found the premature termination of an employee's fixed-term contract to be unfair, as the employer had failed to prove a fair reason for the early termination or that a fair procedure had been followed.

Victimization for Trade Union Membership

In *Safcor Freight (Pty) Ltd t/a Panalpina v SA Freight & Dock Workers Union* (at 335) the employer party standardized the wage cycles of all its employees throughout all its branches and, in doing so, effectively granted certain non-union employees an additional six-month wage increase not enjoyed by other employees, on condition that they did not join a trade union. The Labour Appeal Court upheld an earlier finding by the Labour Court that this amounted to unfair discrimination and victimization of trade union members in contravention of s 5(2)(*c*) and s 5(3) of the LRA 1995, and that it had the potential to undermine the bargaining power of the recognized union.

Disapproval of Racial Slurs

In both *Modikwa Mining Personnel Services v Commission for Conciliation, Mediation & Arbitration & others* (at 373) and *Steenberg and Liebherr Africa (Pty) Ltd* (at 488) the respective adjudicators strongly condemned the use of racially abusive language at the workplace, and found the dismissal of employees who uttered such slurs to be justified, although the remarks had been made in general conversation and were not directly addressed to those immediately affected.

Determination of Employment Relationship

In *Protect a Partner (Pty) Ltd v Machaba-Abiodun & others* (at 392) the Labour Court was required to determine whether a non-executive director, who had joined the applicant business as a BEE partner, was an employee as defined in s 213 of the LRA 1995. Applying the 'reality test' adopted by the Labour Court in *Workforce Group (Pty) Ltd Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 *ILJ* 738 (LC) the court found that the respondent satisfied the first two of the criteria set out therein, and to some extent satisfied the third. She had therefore discharged the onus of proving that she was an employee and the CCMA had jurisdiction to arbitrate a dispute concerning her alleged dismissal.

Interpretation of Bargaining Council Agreement

The applicant union in *SA Clothing & Textile Workers Union & another and Klein Karoo International Ltd* (at 478) called for the interpretation of a bargaining council agreement, which it claimed required an employer to continue to pay wages at weekly intervals after negotiations at plant level to change that interval had failed. The arbitrator found the meaning of the relevant clause in the agreement to be clear. Once the parties had decided to negotiate and those negotiations had failed the dispute was no longer covered by the agreement and became a matter of mutual interest that could be decided by power play.

Constructive Dismissal

An employee who resigned after receiving a final written warning, fearing that it would lead to a disciplinary hearing and possible dismissal, was found in *Regent Insurance Co Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 410) not to have been constructively dismissed. The Labour Court followed the two-stage approach adopted by the LAC in *Jordaan v Commission for Conciliation, Mediation & Arbitration & others* (2010) 31 *ILJ* 2331 (LAC),that required an employee first to show on an objective standard that the employer had made employment so intolerable that resignation was the employee's only reasonable option. Only thereafter was an evaluation made to show whether the

constructive dismissal was unfair. The court found that the employee could have invoked the employer's grievance procedures or referred a dispute to the CCMA if she felt the warning was unfair, and her resignation was premature and unreasonable.

Working Under Influence of Alcohol

The arbitrator in *National Union of Metalworkers of SA on behalf of Johnson and Trident Steel (Pty) Ltd* (at 455) found that an employee who, on reporting for work, had tested positive in a breathalyzer test for the presence of alcohol in his system had correctly been dismissed. Recognizing the need for stringent safety measures at the workplace, the employer had adopted a zero-tolerance approach to working under the influence of alcohol which had been widely publicized, and the test had been properly administered.

Dismissal for Insubordination and Alleged Desertion

A shop steward who refused an instruction to drive a forklift vehicle because he was not certified to do so was found in *National Union of Metalworkers of SA on behalf of Williams and Gold Sun Industries (Pty) Ltd* (at 469) to have been unfairly dismissed. The arbitrator found him not guilty of insubordination because the instruction was, in the circumstances, unlawful. In *United Transport & Allied Trade Union on behalf of Schreiber and Transnet Port Terminals* (at 499) the arbitrator considered the distinction between absence from work without permission and desertion, and found that where the employer was aware of the employee's whereabouts and of the reasons for his absence it had failed to prove that he did not intend to return, and therefore that he had deserted.

Review of Arbitration Proceedings

The Labour Court dismissed an application to review a CCMA award in *ASA Metals (Pty) Ltd (Dilokong Chrome) v Commission for Conciliation, Mediation & Arbitration & others* (at 350), in which some of the reasons articulated by the commissioner for justifying his decision were not supported by the evidence, but where there were other reasons, apparent from the record, that rendered the award reasonable. In *Sandvik Mining & Construction RSA (Pty) Ltd v Molebaloa NO & others* (at 426) the court set aside an award in which the commissioner had relied only on the disputed and contradictory evidence of the employee, finding that there were no reasons, other than those articulated, which could render the award reasonable.

Appeal Against Compliance Order Issued by Labour Inspector

In *Calvinia Lande BK v Department of Labour & another* (at 359) the Labour Court upheld an appeal in terms of s 72 of the BCEA 1997 against a compliance order issued by a labour inspector directing the employer party to pay an employee for overtime worked during the past 12 months. The court first considered whether an appeal in terms of s 72 was a narrow one limited to the information available to the inspector, but concluded that it was a wide appeal, permitting a complete re-hearing and the admission of further evidence. As the evidence showed that the employee had only been employed for ten months, and had in fact been overpaid for his overtime the appeal was upheld and the compliance order set aside.

Registration of Employers' Organization

The appellant in *National Employers United of SA v Registrar of Labour Relations* (at 384) appealed in terms of s 111 of the LRA 1995 against the registrar's refusal to register it as an employers' organization. Here again the Labour Court considered the nature of the appeal, and concluded that it was an appeal in the wide sense, permitting a complete rehearing and the admission of further evidence. The court found on the evidence that the appellant did not meet the requirements of the guidelines for employers' organizations issued in terms of s 95(8) of the LRA, nor the requirements for registration, and dismissed the appeal.

Practice and Procedure

The employee party in *Ferreira v Tyre Manufacturers Bargaining Council & others* (at 364) referred a dismissal dispute timeously for bargaining council arbitration but thereafter took no further steps to prosecute his claim. The Labour Court found that the arbitrator was empowered by the LRA 1995, the CCMA Rules and the bargaining council's constitution, on application by the employer, to dismiss the employee's application for dilatoriness. In *Vemisani Security Services CC v Mmusi & another: In re Mmusi & another v Vemisani Security Services CC* (at 440), after considering the requirements of rule 16A(1)(*b*) and 16A(2)(*b*) of the Labour Court Rules, the court granted the employer's application to rescind a default judgment against it, finding that it had shown good cause for its default.

Quote of the Month:

Tlhothalemaje A in *Steenberg and Liebherr Africa (Pty) Ltd* (2013) 34 *ILJ* 488 (BCA):

'It is trite that whilst it is accepted that there might be something called ''industrial language'' within a workplace, there are limits to the use of such language. It is further trite [that] the use of derogatory or abusive language invariably impairs the dignity of those against whom the language is directed, whether directly or indirectly, and it is not even necessary for offences in this regard to be codified. The use of racist language or epithets is similarly frowned upon for a variety of obvious reasons. Chief amongst these is that, given the painful racial history of this country, and the constitutional right to human dignity as enshrined in the Bill of Rights, it is expected of all citizens to refrain from racially abusing each other, directly or indirectly, and in either words or deeds. It is against this background that, in my view, it is not even necessary for employers to codify rules in this regard as it should be common knowledge that racial abuse and invectives are an absolute no-no.'