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Dear *Industrial Law Journal* Subscriber,

We take pleasure in presenting the May 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 OF THE INDUSTRIAL LAW REPORTS

High Court Jurisdiction in Labour Matters

In *Provincial Commissioner, Gauteng: SA Police Service & another v Mnguni*, the Supreme Court of Appeal ruled that the High Court does not enjoy a residual common-law power to review and set aside a decision of the appeals authority of the SAPS in a matter concerning the dismissal of a police officer for misconduct. The court below had accepted that the appeals authority had performed a quasi-judicial function, and that its decision was therefore subject to review. On appeal the parties accepted that the actions of the appeals authority did not constitute administrative action, and that reliance could not be placed on the provisions of the Promotion of Administrative Justice Act 3 of 2000. The SCA found that, in any event, since the adoption of the new Constitution there were not two systems of law, but only one system shaped by the Constitution, and that the classification of the actions of functionaries into quasi-judicial and administrative was a 'flawed exercise'. The dispute was essentially a labour matter which should be pursued in the Labour Court.

The Labour Court's Jurisdiction

The Labour Court found in *UASA – The Union & another v BHP Billiton Energy Coal SA & another* that, although no section in LRA 1995 expressly clothed it with jurisdiction to consider the validity of an agency shop agreement, it was competent to do so in terms of s 77 of the BCEA 1997, which permits deductions from remuneration in terms of a collective agreement. However, the court found that the validity of an agency shop agreement could not be challenged without first challenging the constitutional validity of s 25 of the LRA, which governs such agreements. In a dispute concerning an employee's unfair dismissal for operational requirements, the employee in *Van Metzinger & another v Conservation Corporation t/a CC Africa* included a claim for the payment of a performance bonus. The Labour Court found that, as the claim had not been referred to conciliation in terms of s 191(1) of the LRA, it only had jurisdiction to consider it if it had been properly pleaded as a contractual claim in terms of s 77(3) of the BCEA.

Unfair Discrimination on the Ground of Age

The employee in *Hibbert v ARB Electrical Wholesalers (Pty) Ltd* whose employment had been terminated at the age of 64, claimed both compensation for automatically unfair dismissal under the LRA and compensation and damages under the Employment Equity Act 55 of 1998. The Labour Court cautioned against permitting a duplication of claims in such cases which worked unfairly against the employer, but found the employee's dismissal on account of his age to be automatically unfair in terms of s 187 of the LRA and to be an act of discrimination in terms of s 6 of the EEA. In the absence of specific proof no damages were awarded.

Unfair Discrimination on the Ground of Conscience

The applicant in *Motaung v Department of Education & others* claimed that she had been the victim of unfair discrimination in terms of the EEA on the ground of conscience when she, as a public servant, had refused to flout the regulatory framework governing private higher education institutions as prescribed by the Higher Education Act 101 of 1997, and had in consequence had certain of her functions reassigned and suffered other prejudice. The Labour Court gave detailed consideration to the meaning of the terms 'belief' and 'conscience', and concluded that it was possible for the applicant to claim unfair discrimination for having followed the dictates of her conscience in such circumstances, that it was not necessary for her to prove that she had been treated differently to other employees, and that she was entitled to the relief claimed.

Residual Unfair Labour Practices

The Labour Appeal Court in *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* considered the correct interpretation of a 'benefit' within the meaning of s 186(2) of the LRA 1995, and found that it is not limited to entitlements that arise *ex contractu* or *ex lege,* but may also include advantages or privileges granted in terms of a policy or practice that is subject to an employer's discretion. The earlier decision of the LAC in *HOSPERSA & another v Northern Cape Provincial Administration* 21 *ILJ* 1066 (LAC), in which the contrary was held, was not followed. The CCMA commissioner in *Akoojee & another and Integrated Processing Solutions (Pty) Ltd* distinguished between two types of bonus payable to employees subject to their employer's discretion, and found that in one case the employees had shown a contractual right to the bonus, while in the other they had not.

On review the Labour Court upheld an arbitrator's finding that a municipal employer's refusal to promote its public service employee was unfair in *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester & others*. The court found the adoption of the review test, which suggested that an arbitrator should only interfere with an employer's exercise of its discretion to grant or refuse promotion where that discretion was exercised capriciously or wrongly, was misplaced, and preferred to adopt the yardstick of fairness to both parties. In *Gebhardt v Education Labour Relations Council & others* an employer who failed to verify the disabled status of an employee, leading it to overlook her request for promotion on the grounds of employment equity, was held to have committed an unfair labour practice. The court found that where an employee has disclosed a disability, the EEA places the onus of verifying that fact on the employer.

Deemed Discharge from the Public Service

In an application brought in terms of s 158(1)*(h)* of the LRA in *Weder v MEC for the Department of Health, Western Cape* the Labour Court reviewed and set aside the decision of the respondent MEC not to grant reinstatement to a public servant who was deemed to have been discharged by operation of law in terms of s 17 of the Public Service Act 103 of 1994 after being absent for more than a month. The employee's absence had been due to genuine illness, and the court found the MEC's refusal to have been irrational and arbitrary.

Strikes and Strike Action

In *Motor Transport Workers Union on behalf of Sehularo & others v G4 Cash Services (Pty) Ltd* the Labour Court took into account the nature of the employer's enterprise, which was time-critical, to determine the fairness of a very short ultimatum issued to striking workers prior to their dismissal for taking part in an unprotected strike. The court found that, although short, the ultimatum complied fully with the requirements of item 6(1) of the Code of Good Practice: Dismissal, and that, in view of the strikers' serious misconduct, and their historically acrimonious relationship with their employer, their dismissal was warranted. In *Transnet SOC Ltd v SA Transport & Allied Workers Union* the union party proposed to call a secondary strike that would have a major impact on the secondary employer and on the economy of the country as a whole. The court found such a strike not to be reasonable in relation to the slight possible impact it might have on the primary employer, and granted an interim interdict prohibiting strike action pending the furnishing of a report in terms of s 66(4) of the LRA.

SAPS Discipline Regulations

The Labour Court examined the provisions of reg 13(2) of the SAPS Discipline Regulations 2006 in *Ntuli v SA Police Service & others*, and held that, where a police officer is suspended without pay pending a disciplinary enquiry, he or she has no right not to be suspended, provided that the suspension complies with the requirements of the regulation.

Determination of Employment Relationship

The arbitrator found in *Bachoo and Sasol Oil* that an employee who was placed with a client by a temporary employment agency remained the employee of the agency, and did not become the employee of the client. The arbitrator distinguished the recent Labour Court decision in *Dyokhwe v De Kock NO & others* (2012) *ILJ* 2401 (LC) because in that case the employee's original contract had been with the client, not the TES.

Mutual Termination of Employment

An employee who left his post during working hours and gave no indication of any intention to return to work was held by the arbitrator in *Petersen and Dennes Engineering (Pty) Ltd* to have chosen to terminate the employment relationship. When the employer accepted that choice, the relationship terminated by implied mutual consent, and there was no dismissal.

Disciplinary Action after Reinstatement

In *Food & Allied Workers Union & others v Premier Foods Ltd t/a Blue Ribbon Salt River* employees who took part in a violent strike, were dismissed ostensibly for operational requirements after disciplinary proceedings against them were abandoned. In court proceedings they were found to have been unfairly dismissed. The LAC ordered their reinstatement. The employer complied with the order but then suspended the employees and embarked on further disciplinary proceedings arising from the original facts. The Labour Court found that no new facts had arisen which would warrant the employer reversing its original decision not to discipline the employees for misconduct, and granted the employees an urgent interim order interdicting the intended proceedings.

The Review of Demarcation Awards

In demarcation proceedings in *SA Municipal Workers Union v Syntell (Pty) Ltd & others*, after hearing both parties the commissioner prepared a draft award and submitted it to NEDLAC, as required by s 62(7) of the LRA. NEDLAC did not support the award and, after further consideration, the commissioner changed his ruling and issued an altered award to the parties. On review, the Labour Court held that the commissioner was entitled to change his approach before delivering his final award, and that the parties were not entitled to a second hearing to comment on NEDLAC's views.

The Review of Arbitration Awards

In an application to review a CCMA award in *Protech Khuthele (Pty) Ltd & another v Wabile NO & others* the employer party alleged that the commissioner's prior association with SACCAWU, which shared a trade union federation affiliation with NUM, the third respondent, gave rise to a reasonable apprehension of his bias in favour of the union. The Labour Court considered and distinguished several judgments in which the subject-matter of the litigation arose directly from the arbitrator's prior association, and found that differences in outlook on the part of different commissioners were inevitable, and to be welcomed. What was fundamental was that commissioners should conduct proceedings and issue awards without

fear or favour according to the facts and the law, without allowing their personal views to intrude. In *SA Custodial Management (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* the court reiterated the test for the review of awards and found that the commissioner had misdirected himself by applying unjustifiable cautionary rules against the acceptance of certain evidence, which had deprived the losing party of a fair trial, and had thereby committed a gross latent irregularity which warranted review.

Settlement Agreements

The Labour Court found in *Ferguson v Basil Read (Pty) Ltd* that an employee who entered into a settlement agreement for the termination of his employment, when faced with possible dismissal for operational requirements, had done so voluntarily and had not been induced to do so by any misrepresentation. He was consequently not dismissed.

Practice and Procedure

In *PT Operational Services (Pty) Ltd v Retail & Allied Workers Union on behalf of Ngweletsana* the Labour Appeal Court considered at what stage a CCMA commissioner becomes *functus officio*, after making a ruling or award. The court noted that s 144 of the LRA gives commissioners limited power to revoke their own decisions, and found that the powers or functions of an administrative agency are only exhausted after the final performance of all the statutory duties relating to a particular matter. Where the commissioner, having issued a default award, subsequently made a ruling which was not final in effect, he was not *functus officio,* and could amend his ruling later. Where the applicant in *Chauke v Machine Tool Market (Pty) Ltd* was a lay litigant and not proficient in English, the Labour Court considered the standard of pleadings required from him, and found it only necessary to set out the essential nature and basis for his claim. It was not appropriate for the respondent to challenge that statement by way of a formal exception. In review proceedings the applicant party in *Stars Away International Airline (Pty) Ltd t/a Stars Away Aviation v Thee NO & others* delivered a supplementary affidavit, but did not accompany it by a notice as required by rule 7A(8)*(a)* of the Labour Court Rules. The court considered the terms of rule 7A(8)*(a)* and found it to be peremptory. The mere delivery of the affidavit without the notice did not trigger the time period in rule 7A(9) and the applicant was not required to apply for condonation of its late delivery.

Evidence

In *Satekge and SA Broadcasting Corporation Ltd*, in which an employee had made certain admissions in evidence at a default arbitration hearing, which was subsequently rescinded, the employee was held to be bound by those admissions in subsequent arbitration proceedings.

Quote of the Month:

Van Niekerk J in *Protech Khuthele (Pty) Ltd & another v Wabile NO & others* (2013) 34 *ILJ* (LC), commenting on the differing perspectives of CCMA commissioners called on to arbitrate disputes:

> 'These differences in outlooks on life and conceptions of society are not remarkable, nor are they objectionable. On the contrary, they are inevitable, and should be welcomed. The diversity of commissioners, drawn as they are mainly from the ranks of persons engaged in one way or another in the industrial relations community, and the diversity and richness of their experience, is no doubt an integral component of the CCMA's success as a statutory dispute-resolution agency.'