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Dear *Industrial Law Journal* Subscriber

We take pleasure in presenting the October 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.

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.

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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We welcome your feedback

Kind regards

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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Employment Relationship

In *Abou-Zeid v Cyberlisting Services (Pty) Ltd t/a ifind & another* (at 2553), relying on the presumption of employment contained in s 83A of the BCEA, the plaintiff claimed before the High Court that a joint venture agreement that he had entered into with the respondent had also given rise to an employment relationship between the parties. The court found his reliance on s 83A to be misplaced. The joint venture was a partnership, and partners could not serve one another in an employer-employee relationship. Similarly, in *Fourie and Workmed Occupational Health & Safety Systems (Pty) Ltd* (at 2682) the CCMA commissioner found that, although a general manager had purported to appoint a consultant to a permanent position as a sales manager, she had lacked the authority to make such an appointment, and that therefore no employment relationship had arisen.

Bargaining Council Jurisdiction

The third respondent municipality in *Arends & others v SA Local Government Bargaining Council & others* (at 2560) had entered into a pay parity agreement with two trade unions representing its employees. The employees later disputed certain salary reductions made by the municipality, and purported to refer a dispute concerning the interpretation or application of the agreement to the respondent bargaining council in terms of s 24 of the LRA. The arbitrator found that he lacked jurisdiction to arbitrate the matter. On review the Labour Court upheld the arbitrator's ruling. Section 24 required that the dispute must be about the interpretation or application of a collective agreement, and it must be between the parties to the agreement. The employees were not parties but only the beneficiaries of the agreement between the municipality and the unions. Further, the agreement did not prohibit a reduction in salaries, so the dispute did not arise from the agreement.

CCMA Jurisdiction

In *H & A Manufacturing (Pty) Ltd v Pender-Smith & others* (at 2581) the Labour Court considered whether the CCMA had jurisdiction in terms of s 24(8) of the LRA to interpret and apply an agreement in settlement of a dispute concerning the termination of an employee's employment. The court considered case law on the interpretation of s 24(8) and concluded that the wording was sufficiently broad to include disputes that were not collective in nature, and that the CCMA had the necessary jurisdiction. Similarly, in *Latinsky & Co (Estate Late J E Latinsky) v Mooi NO & others* (at 2613) the court found that the CCMA had jurisdiction in terms of s 191(12) of the LRA to arbitrate an unfair retrenchment dispute where, although it seemed uncertain whether only a single employee had been retrenched, consultation in terms of s 189(3) had been initiated for respect of the single respondent employee. The CCMA commissioner in *National Transport Movement on behalf of Ratlhagane and Passenger Rail Agency of SA (Pty) Ltd t/a Metrorail Gauteng* (at 2700) found that he lacked jurisdiction to arbitrate an unfair dismissal dispute which had been referred twice on behalf of the same employee by two different unions, finding the second referral to be *res judicata*.

CCMA Jurisdiction – Unfair Labour Practices

In *Trans-Caledon Tunnel Authority v Commission for Conciliation, Mediation & Arbitration & others* (at 2643) the Labour Court gave further consideration to the correct interpretation to be placed on the Labour Appeal Court decision in *HOSPERSA & another v Northern Cape Provincial Administration* (2000) 21 *ILJ* 1066 (LAC) and concluded that the CCMA's unfair labour practice jurisdiction in terms of s

186(2)*(a)* of the LRA was not excluded simply on the ground that an employee's claim to a benefit did not arise *ex contractu* or *ex lege*. The protection afforded by s 186(2)*(a)* was founded in equity and the true principle of *HOSPERSA* was that the CCMA's jurisdiction should not be used to assert entitlement to new benefits.

Referral to Court for Opinion on a Question of Law

The dispute between the parties in *National Education Health & Allied Workers Union & others v MEC: Department of Health, Eastern Cape & others* (at 2628) had been a long-standing one centred on the respondent's decision to reverse certain promotions and salary increases which it had granted to certain employees. After extensive litigation the private arbitrator before whom the matter finally came, referred a question of law to the Labour Court for an opinion in terms of s 20 of the Arbitration Act 42 of 1965. The court considered the scope of s 20 and expressed the view that, as it was an exceptional provision and out of deference to the principle of party autonomy, the court's powers under s 20 should be used sparingly. The court nevertheless considered the question of law and ruled that the arbitrator was entitled to have regard to collective agreements referred to in a settlement agreement which had itself been superseded by new regulations.

Bargaining Council Agreement — Exemption

Colyn's Transport CC and National Bargaining Council for the Road Freight Industry (at 2719) concerned an application by an employer falling within the jurisdiction of a bargaining council for exemption from the council's provident fund to enable the employer and its employees to join a more advantageous fund. The application was refused. The council's independent body, which heard the employer's appeal, considered the factors to be taken into account when assessing whether the employer had shown any 'special circumstance' which would warrant an exemption, and found that the employer had not discharged the burden of proof to show such circumstances.

Strikes and Lock-outs

Where, in *In2Food (Pty) Ltd v Food & Allied Workers Union & others* (at 2589), an unprotected strike had been marred by violence and damage to property and the respondent trade union and employees had ignored an interim order interdicting strike action, the Labour Court subsequently found the union and its office-bearers to be in contempt of court, and fined the union an amount of R500,000. In *Mawethu Civils (Pty) Ltd & another v National Union of Mineworkers & others* (at 2624) the court considered the limitations on the right to strike imposed by s 65(1)*(c)* of the LRA and found that these related only to disputes which might be arbitrated or adjudicated in terms of the LRA. Where the dispute related to a claim for wages which could be referred to court in terms of the BCEA 1997 the employees still had the right to strike. *SA Transport & Allied Workers Union v Bidair Services (Pty) Ltd* (at 2637) concerned an employer's purported lock-out of employees who refused to accept their employer's new roster system. On the evidence the court did not accept that the employees had been locked out, but found that, even if they had, the lock-out was protected as it was in response to an unprotected strike.

Dismissals — Fair and Unfair

The Labour Court in *Continental Oil Mills (Pty) Ltd v Singh NO & others* (at 2573) reviewed and set aside a CCMA award in which the commissioner had made a distinction between an employee's unlawful possession or theft of her employer's goods, finding the former to be less culpable. The court found that both belonged to the same genus of dishonesty, and warranted dismissal. In *Trio Glass t/a The Glass Group v Molapo NO & others* (at 2662) the court rejected an employer's claim that he had not dismissed

an employee because at the commencement of the employment relationship the parties had agreed that if it did not work out they would part ways amicably. The court found that, although the employee was not informed that she was dismissed, the existence of the dismissal was established by the employer's conduct and that the dismissal was unfair. The parties could not contract out of the protection afforded to the employee by the LRA. The CCMA commissioner in *Tlhase and Development Bank of Southern Africa* (at 2703) considered whether an employee on a fixed-term contract had a reasonable expectation that her contract would be renewed, but concluded, on an objective test, that she had not proved the existence of facts that would lead a reasonable person to anticipate renewal, and that she had therefore not been dismissed. In *Bhengu & another and Transnet Freight Rail* (at 2711), in which two employees insisted that they were too ill to work but failed to provide any proof of their illness or to cooperate in their employer's efforts to accommodate them, the arbitrator found their dismissal for incapacity to have been fair. The High Court of Namibia in *Rosh Pinah Zinc Corporation (Pty) Ltd v Muronga* (at 2748) considered the duties of an employer relating to the dismissal of an employee for incapacity arising from a non-work related injury, with particular regard to the terms of the Namibian Labour Act 1992 which was then applicable. In the absence of any Namibian judicial authority on the issue the court considered South African law for clarity, and found that the employer had acted fairly by offering the employee alternative and adapted employment at a lower salary, and that his dismissal after refusing that offer was fair.

Disciplinary Penalty – Alcohol

The arbitrator in *General Industries Workers Union of SA on behalf of Thokoane and Lafarge Industries SA (Pty) Ltd* (at 2732) found an employer's imposition of a 'zero tolerance rule' for alcohol, which resulted in an employee's dismissal for having a level of only 0.05mg of alcohol in his blood-stream, to be unreasonable. Intoxication was a matter of degree, and whether dismissal was an appropriate sanction would depend on the circumstances of the particular case.

Practice and Procedure

In *LA Crushers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 2593), in which the applicant employer denied having received notice of set down of con-arb proceedings, the Labour Court considered the provisions of s 191(5A) of the LRA and rule 17 of the CCMA Rules, and held that the commissioner had to be satisfied that notice had actually been placed in the possession of the employer, and that it was not sufficient to show that notice had been given by fax transmission to the private fax of the employer's operations director. In *Makinana & others v Harbron t/a Harbron Quarries & Groenendal Boerdery* (at 2618) the CCMA had determined that the respondent was the employer of dismissed employees, and the matter had then been referred to the Labour Court as it concerned an alleged automatically unfair dismissal. The court granted an interlocutory application by the employees declaring that it was bound by the CCMA's preliminary ruling in the proceedings before it.

Evidence

Where the commissioner in arbitration proceedings had failed to warn an unrepresented party that its failure to lead evidence could lead to an adverse inference being drawn against it, the Labour Court found in *Land Bank v Nowosenetz NO & others* (at 2608) that this amounted to a reviewable irregularity and remitted the matter for rehearing before a different commissioner. In *Bhengu & another and Transnet Freight Rail* (at 2711) in arbitration proceedings the commissioner had warned the employee parties of the consequences of failing to cross-examine the employer's witnesses or challenge their evidence. When, despite this, the employees failed to address those issues, the commissioner accepted the employer's evidence as uncontested.

Quote of the Month:

Steenkamp J in *In2Food (Pty) Ltd v Food & Allied Workers Union & others* (2013) 34 *ILJ* 2589 (LC):

'The time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long trade unions have glibly washed their hands of the violent actions of their members. This in a context where the Labour Relations Act 66 of 1995, which has now been in existence for some 17 years and of which trade unions, their office-bearers and their members are well aware, makes it extremely easy to go on a protected strike, as it should be in a context where the right to strike is a constitutionally protected right.'

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