



## INDUSTRIAL LAW JOURNAL MONTHLY PREVIEW

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### Dear *Industrial Law Journal* Subscriber

We take pleasure in presenting the November 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](mailto:akleinsmidt@juta.co.za)

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We welcome your feedback

**Kind regards**

**Juta General Law**





## HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

### Legal Representation before the CCMA

The Supreme Court of Appeal has recently overturned the judgment of the High Court in *Law Society of the Northern Provinces v Minister of Labour & others* (2012) 33 ILJ 2798 (GNP), and has ruled in *Commission for Conciliation, Mediation & Arbitration & others v Law Society of the Northern Provinces (Incorporated as the Law Society of the Transvaal)* (at 2779) that rule 25(1)(c) of the CCMA Rules, which limits a party's right to legal representation in cases involving dismissal for misconduct or incapacity, is not irrational nor an infringement of any party's constitutional rights. The court examined the historical development of the new labour dispensation as codified in the Labour Relations Act 66 of 1995, and the compromises reached by NEDLAC in the process, and found that the bulk of cases referred to the CCMA concern unfair dismissals for incapacity and misconduct, and that the legislature had identified these as categories where legal representation might correctly be excluded. The court below had failed to consider a commissioner's wide discretion to allow legal representation in suitable cases. The SCA further found that the Promotion of Administrative Justice Act 3 of 2000 did not apply to the case. Finally, the right to legal representation exists for the benefit of litigants, and not of lawyers.

### The Test for the Review of Arbitration Awards

In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (at 2795) the Supreme Court of Appeal was required to consider whether a CCMA award in favour of an employee had correctly been reviewed and set aside by the Labour Court. The Labour Appeal Court had upheld that decision. The SCA considered whether court decisions handed down after the Constitutional Court judgment in *Sidumo & another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC) have given rise to a more generous standard of review than that laid down in *Sidumo* together with the specific grounds set out in s 145(2)(a)-(b) of the LRA. In this regard it held the notions of 'latent irregularity' and of 'dialectical unreasonableness' not to be permissible developments of the law. A result would only be unreasonable if it was one that a reasonable arbitrator could not have reached on all the material available to him or her. Material errors of fact, as well as the weight and relevance to be attached to particular facts, were not in and of themselves sufficient for an award to be set aside.

### Unfair Discrimination

The Equality Court in *Singh v Minister of Justice & Constitutional Development & others (SA National Council for the Blind & another as Amici Curiae)* (at 2807) found the failure by the Magistrates Commission to take into account an applicant's disability when considering her for appointment to a magisterial post to be unfairly discriminatory. The requirement in s 174(2) of the Constitution 1996 for the judiciary to reflect broadly the racial and gender composition of South Africa did not exclude other factors such as disability mentioned in s 9(3) of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The aim of the legislation was to promote diversity in the judiciary, and it was vital that disabled people should be represented in the magistracy.

### Restraint of Trade

In *Ball v Bambalela Bolts (Pty) Ltd & another* (at 2821) the Labour Appeal Court upheld the grant by the Labour Court of an interdict restraining a former employee from taking up employment with a competitor for the balance of a one-year restraint of trade agreement, but held that it was not competent for the court below to order the competitor to terminate the employment of the former employee. If that order





were granted the competitor would have to dismiss the employee even though the restraint had already expired because the order was not limited to the period of the restraint.

### **Settlement Agreements**

On appeal the Labour Appeal Court has found in *Greeff v Consol Glass (Pty) Ltd* (at 2835) that settlement agreements which comply with the criteria stated in s 158(1A) of the LRA may be made orders of court, even though no dispute relating to the settlement agreement had been referred to the court for adjudication. The court preferred a wider interpretation of s 158(1)(c) read with s 158(1A), and did not restrict the power of the Labour Court to make settlements orders of court to those settlements which had been entered into after failed conciliation which had been referred for adjudication. The Labour Court judgment to the contrary (see (2012) 33 ILJ 1167 (LC)) was set aside. The CCMA commissioner in *Ndlovu and Midway Two Contractors (Pty) Ltd & another* (at 2993) found that he had no jurisdiction to consider a dispute arising from a settlement agreement which the employee alleged he had been coerced into signing. The employee was held to be bound by the agreement and his only recourse was to have it set aside by the Labour Court.

### **Fair and Unfair Dismissal**

The Labour Court held in *Western Cape Education Department v General Public Service Sectoral Bargaining Council & others* (at 2960) that an employer who had ignored an employee's request for incapacity leave or ill-health retirement, and had thereafter made excessive deductions from the employee's salary, had unfairly constructively dismissed him. In the special circumstances the court ordered reinstatement. In *Khuzwayo and Tsogo Sun Group* (at 2969) the commissioner found that where there was no written rule forbidding the use of profane language dismissal for such conduct was not warranted. Where an employee had assaulted a fellow worker outside the workplace the arbitrator in *Moloto and Gazelle Plastics Management* (at 2999) held that dismissal was still justified. In *National Union of Metalworkers of SA on behalf of Mahlalela and Kusile Fabrication* (at 3021), in which an employee presented a suspect medical certificate to explain his absence from work, the document was found at arbitration to have been falsified, and his dismissal for fraud to be fair.

The employer in *Lekoko & others and Foschini Group (Pty) Ltd* (at 2978) held all its employees liable for stock losses and dismissed them, relying on 'team misconduct'. The commissioner considered the case law on collective responsibility and found dismissal to be justified where the individual components of a group each culpably failed to ensure that the group complied with a rule or attained the set standard of performance. However, he found that the employer had failed to prove the existence of the alleged losses, or whether the acceptable norm for such losses had been exceeded, and that the dismissals were unfair.

### **SA Police Service — Employment Equity Plan**

The employment equity plan of the SA Police Service again came under scrutiny in *Munsamy v Minister of Safety & Security & another* (at 2900), in which an Indian male police officer claimed that the failure of the national selection panel of the SAPS to approve his application for promotion on the ground that Indian males were over-represented at the level of superintendent, amounted to unfair discrimination against him. The Labour Court referred to the requirements of the Employment Equity Act 55 of 1998 and then considered whether the SAPS's decision, as a designated employer, was in line with a defensible employment equity plan as required by the Act. The court enumerated the various steps which the employer must take in order to conform with those requirements, and concluded that SAPS had failed to show that its plan had been the subject of proper consultation and that the measures relied on to deselect the employee were permitted in line with a rational coherent plan intended to address inequitable representation in the workplace. The claim of unfair discrimination was upheld.





In *Solidarity on behalf of Van der Walt & others v SA Police Service & others* (at 2943) the applicants sought and were granted an urgent interim interdict pending the determination of two disputes relating to the promotion of senior police officers which had already been referred to the Labour Court. The first claimed unfair discrimination against certain officers and the second attacked the SAPS employment equity plan, which they claimed was expressly race based and amounted to a quota system. The court found it clear from recent authority that an employer may, in order to achieve equitable representation in the workplace, introduce employment equity measures which might include numerical targets and preferential treatment, but could not adopt quotas. The SAPS plan appeared to impose an absolute bar to promotion on the basis of race.

### **CCMA Jurisdiction**

In *Afgrigri Operations Ltd v MacGregor NO & others* (at 2847), in which a trade union's constitution did not allow it to organize in the sector in which employer operated, the Labour Court held that the union had no legal standing to refer a dispute relating to a refusal to bargain to the CCMA, and that the CCMA therefore lacked jurisdiction to conciliate the matter.

### **Bargaining Council Jurisdiction**

In both *Department of the Premier, Western Cape v Plaatjies NO & others* (at 2876) and *Public Servants Association on behalf of Strauss & others v Minister of Public Works NO & others* (at 2929), in which disputes concerning the interpretation and application of a collective agreement had been referred to a bargaining council in terms of s 24 of the LRA, the Labour Court held that the council did not have jurisdiction to consider an alternative unfair labour practice claim based on the alleged unfair implementation of the agreement.

### **The Rescission of Awards**

On review the Labour Court refused to set aside a commissioner's refusal in terms of s 144(a) of the LRA to rescind a default award made in the absence of the employer in *BHP Billiton Hotazel Manganese Mines (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 2857). The court found that the award had not been made by the commissioner 'erroneously' within the meaning of s 144(a) but that the default was due to the employer's own negligence in failing to attend the hearing. In *Crown Chicken (Pty) Ltd t/a Sovereign Foods v Commission for Conciliation, Mediation & Arbitration & others* (at 2872) a commissioner who had dismissed a referral in the supposed absence of the employee later rescinded that order of his own accord when he realized that the employee was in fact present. The court found that he had acted correctly, and was not required to base his ruling only on an opposed application that was before him.

In *Saville Row (Pty) Ltd t/a Webbers Clothing & Footwear v Commission for Conciliation, Mediation & Arbitration & others* (at 2935) the employer party first became aware that a default award had been made in favour of an employee when it received a fax to that effect on 28 December. The employer only applied to rescind that award on 19 January, and claimed before the CCMA that in terms of rule 3(2) of the CCMA Rules the period from 16 December to 7 January must be excluded from the 14-day period prescribed for the filing of applications to rescind, and that the application was not out of time. The commissioner refused to rescind the award and the matter was taken on review. The court found that the period concerned was not dies non, and further that where the application for rescission was lodged outside the prescribed period the CCMA lacked jurisdiction to hear the matter unless it was accompanied by an application for condonation.





### **The Requirements for a Legal Lock-out**

In *Transport & Allied Workers Union of SA on behalf of Members v Algoa Bus Co (Pty) Ltd & another* (at 2949) two trade unions notified two employers that their members would go on strike, while a third union advised that its members would not join the strike. The employers gave notice of a proposed lock-out of the total workforce. The Labour Court granted the non-striking employees an urgent order interdicting the employer from locking them out. The court noted that the purpose of a lock-out was to compel employees to accept the employer's demand. Where there was no dispute between them there could be no demand for the employees to accept, and the employers were not entitled to lock them out.

### **Prescription**

The Labour Court in *Coetzee & others v Member of the Executive Council of the Provincial Government of the Western Cape & others* (at 2865) questioned whether the Prescription Act 68 of 1969 in fact applies to claims under the LRA. After reference to a number of decisions in which the courts have accepted 'as established or even trite' that the Act does apply, the court in *Coetzee* suggested that this approach requires reconsideration, and that the Prescription Act is inconsistent with the design of the LRA. Its application would in the court's view create inequalities between litigants using different routes for their disputes and would be unworkable where disputes move between tribunal and court and vice versa.

### **Excessive Delay in Prosecuting Review Proceedings**

In *National Union of Mineworkers v Commission for Conciliation, Mediation & Arbitration & others* (at 2913) the applicant union filed an application to review an arbitration award timeously, but then delayed for four years before prosecuting its application. The respondent employer objected to the delay and argued that the union should have applied for condonation. The Labour Court disagreed, and held that the employer should have applied to dismiss the review application in accordance with rule 11 of the Labour Court Rules. Nothing in the LRA 1995 or the rules provided that a litigant must apply for condonation because of delay in prosecuting any legal proceedings.

### **Practice and Procedure**

In *Ball v Bambalela Bolts (Pty) Ltd & another* (at 2821), in which an appeal in a restraint of trade dispute only reached the Labour Appeal Court after the period of restraint had expired, the LAC held that the matter had not become moot as the question of the costs in the court below was still a vital issue. In a dismissal dispute referred to the Labour Court the applicant in *Mbhele v SA Bank Note Co (Pty) Ltd* (at 2889) applied to strike out certain allegations made by the employer against him arising from a forensic investigation that it had undertaken, on the ground that they had not formed part of the charges for which he had been dismissed. The court noted that it would in due course have to exercise the value judgment that a commissioner would otherwise have performed, and that the outcome of the forensic audit was very relevant to the issue of trust and of appropriate sanction. The application was therefore refused. The court in *Mkhize v Antrobus NO & another* (at 2893) granted an employer's application for security for its costs in an application to review a private arbitration award where the prospects of success for the employee were unlikely, and it appeared that he would not have the means to meet an adverse costs order. In *Mothaola and Transnet Rail Engineering* (at 3012) the arbitrator refused an employee's application for his recusal on the ground of bias. The arbitrator restated the legal test for recusal, but found that the presumption that a judicial officer was impartial was not easily rebutted, and that the employee had based her application not on the arbitrator's alleged partiality but on the relevance and weight to be attached to the evidence led at the arbitration. The arbitrator in *Moloto and Gazelle Plastics Management* (at 2999) restated the factors to be taken into account by an arbitrator when faced with two irreconcilable versions of the evidence on which he was required to make findings of fact.





**Quote of the Month:**

Malan JA in *Commission for Conciliation, Mediation & Arbitration & others v Law Society of the Northern Provinces (Incorporated as the Law Society of the Transvaal)* (2013) 34 ILJ 2779 (SCA):

'Nothing in the Constitution nor any decided cases suggests that lawyers have a right to receive business. Where they receive business through the operation of the courts or other tribunals that is because their clients have a right to employ their services and not because they have a right to provide them.'

