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**Dear *Industrial Law Journal* Subscriber**

We take pleasure in presenting the January 2014 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.

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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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**Kind regards**

**Juta General Law**





## HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

### Public Service — Discharge by Operation of Law

The Constitutional Court has again in *Grootboom v National Prosecuting Authority & another* (at 121) considered the interpretation and application of s 17(5)(a)(i) of the Public Service Act, which provides for the deemed dismissal by operation of law of a public servant who has been absent without leave for more than a month. The Labour Appeal Court had in *Grootboom v National Prosecuting Authority & another* (2013) 34 ILJ 282 (LAC) ruled that once the circumstances set out in s 17(5)(a)(i) exist, the deeming provision applies without any action or decision on the part of the employer that can be challenged in a court of law. The CC endorsed this interpretation of s 17(5)(a)(i), but held that the LAC had been incorrect in finding that the appellant had been absent without leave. As the employee was on precautionary suspension during the time he was away, he was absent with the permission of his employer; an essential requirement of s 17(5)(a)(i) had therefore not been met, and he had been dismissed by the employer.

### Retrenchment

In *Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical Energy Paper Printing Wood & Allied Workers Union* (at 140) the Labour Appeal Court overturned an earlier decision of the Labour Court reported in (2012) 33 ILJ 2386 (LC) and found that retrenched employees who had rejected their employer's offer of alternative employment at the same or an increased wage had acted unreasonably, and that they were not entitled to claim severance pay in terms of s 41 of the BCEA. Only those who were offered employment with decreased wages were entitled to a retrenchment package.

### Unilateral Changes to Terms and Conditions of Employment — Right to Strike

Where employees in *Autopax Passenger Services SOC Ltd v SA Transport & Allied Workers Union & others* (at 149) proposed to take strike action in response to their employer's intended withdrawal of their Sunday work and special meal allowances, the Labour Court refused to grant the employer an interim interdict forbidding the strike. The court found that the dispute was not a rights dispute but a dispute of interest. Section 64(4) of the LRA therefore did not apply, and once the employees had met the procedural requirements of s 64(1) they were entitled to strike over the issue. In *Pikitup Johannesburg (SOC) Ltd v SA Municipal Workers Union & others* (at 188), where the employer unilaterally withdrew its longstanding provision of free transport for its workers and a half day off, the court found that this did not amount to a change to terms and conditions of employment, but only to a change of work practice, and that s 64(4) did not apply. The court granted an interdict prohibiting proposed strike action. The employee parties in *Unitrans Supply Chain Solutions (Pty) Ltd v SA Transport & Allied Workers Union & others* (at 265) also claimed that a change in the employer's requirements for the completion by employees of questionnaire forms amounted to a change to their terms and conditions of employment and referred a dispute to the relevant bargaining council for conciliation. When the dispute could not be settled they gave notice to strike. Here again the court found that the changes related only to work practices, and that a strike would not be protected.

In *SA Municipal Workers Union v City of Tshwane & another* (at 241) the parties had entered into a collective agreement regulating the times of shifts. When the agreement expired the employer proposed to change the hours of shifts and the employees claimed before the Labour Court that this amounted to a unilateral change to their terms and conditions of employment and sought an urgent interdict. The court found that the terms of a collective agreement were not only binding on individual employees but were incorporated into their contracts of employment. Although the collective agreement had lapsed its terms therefore remained in their contracts. However, the court further found that the employees had other remedies available to them and could not show the requirement of urgency.





## Strike Action — Lawfulness of Demand

In *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members & others (1)* (at 201) the employees of a company providing waste management services to the City of Johannesburg objected to the breathalyzer testing of drivers before they received the keys of their trucks, and to the introduction of a biometric access control system, demanded that these measures be prohibited, and gave notice of strike action in accordance with s 64(1)(b). The employer claimed before the Labour Court that the demands were not lawful or legitimate, and could not found an authorized strike. The court considered the limitations placed on the right to strike which, in the court's view, was intricately connected with collective bargaining and with what would be lawful or legitimate topics for collective bargaining. The court granted an interim interdict after finding that there was not a sufficient nexus between the demands made and the working terms and conditions of the employees and that the issues raised could not form part of collective bargaining, and so could not be the subject of protected strike action. On the return day of that order, as reported in *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members & others (2)* (at 224), another court undertook an extensive analysis of the definition of a strike and of the meaning of the phrase 'any matter of mutual interest'. That court took the view that although breathalyzer testing and biometric access control fell within the management prerogative, they were nevertheless matters of mutual interest to both employer and employees, and dismissed the rule nisi.

## Fixed-term Contract — Expectation of Renewal

The commissioner in *Pretorius and Prime Product Manufacturing (Pty) Ltd* (at 305) was required to determine whether an employment contract which purported to be for a fixed period of three months was in fact a simulated contract, and was in fact open-ended, subject to a three-month probationary period. The commissioner considered the law applicable to such cases and found no indication that the employee would be appointed permanently after the contract expired, or any mention of a probationary period. The employee had also failed to prove any expectation of renewal.

## Residual Unfair Labour Practices

Relying on the LAC judgment in *Apollo Tyres SA (Pty) v Commission for Conciliation, Mediation & Arbitration & others* (2013) 34 ILJ 1120 (LAC), the Labour Court in *City of Cape Town v SA Local Government Bargaining Council & others* (at 163) placed a wide interpretation on the term 'benefit' in s 186(2)(a) of the LRA and found that it included a right or entitlement to which an employee was entitled *ex contractu or ex lege* as well as an advantage or privilege granted to an employee in terms of a policy or practice subject to the employer's discretion. The court therefore found that an 'essential user scheme', entitling an employee to use his own vehicle for work purposes subject to certain payments, did fall within the definition of 'benefit', even though it was intended as a reimbursive allowance. Similarly, in *SA Revenue Services v Ntshintshi & others* (at 255) the court interpreted the term 'benefit' widely, and concluded that a travel allowance offered to field workers who spent more than half their time in the field and who chose to use their own vehicles fell within that definition. The court further found that although the claimant employee did not fully qualify for the allowance because she spent less than half her time in the field, neither did her fellow workers who all continued to receive the allowance, and that it was therefore unfair to refuse it to her.

Trainee employees in *National Union of Mineworkers on behalf of Mashao & others and Eskom Holding SOC Ltd (Generation Division, Koeberg Operating Unit)* (at 290) maintained that their employer had committed an unfair labour practice relating to training by requiring them to submit to additional psychometric testing before leaving their training programme. The CCMA commissioner accepted on the evidence before him that the employer was entitled to call for additional testing and had valid reasons for doing so, but found that it should have consulted with the employees and warned them of the potential consequences for their training should they fail the tests. It had therefore committed an unfair labour practice.

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## Basic Conditions of Employment Act 75 of 1997

The Labour Court held in *Davidson v Emvest Asset Management (Pty) Ltd* (at 171) that an employer was not entitled in terms of s 34(1)(b) of the BCEA to deduct from monies due to an employee an amount purportedly due to SARS for the payment of tax on income earned from another company outside South Africa. In *Naidoo v Careways Group (Pty) Ltd* (at 181) the court held that an employer was not entitled to retain the whole of an employee's salary as set-off against tax owed by the employee to SARS. Such a deduction could not exceed one-quarter of the salary due and contravened s 32(3) and s 34(1)(d) of the BCEA.

## Dismissal – Fair and Unfair

The commissioner in *Mdlalose and University of Johannesburg* (at 277) found the sanction of dismissal to be appropriate for an employee who had been found guilty on three charges of misconduct involving dishonesty. The arbitrator in *National Union of Metalworkers of SA on behalf of Smith and Hilfort Plastics – A Division of Astrapak Manufacturing Holdings (Pty) Ltd* (at 315) found dismissal to be warranted where an employee had directed a racial slur at another employee. The fact that he had uttered the words in anger or on the spur of the moment was held to be irrelevant. His actions undermined workplace relations and his dismissal was fair.

## Practice and Procedure

In *Grootboom v National Prosecuting Authority & another* (at 121) the Constitutional Court noted with disapproval the regularity with which litigants and their lawyers regularly disregard the rules and directions of the court and, where the respondents had failed to provide a reasonable explanation for their delay in filing answering affidavits, refused to condone that delay. In a dissenting judgment Zondi J found it to be in the interests of justice to grant condonation, since the respondents appeared to have reasonable prospects of success and the issues raised were of importance to many affected public servants.

The arbitrator in *National Union of Metalworkers of SA on behalf of Selepe & others* (at 317) considered whether he had jurisdiction to arbitrate a dispute which had been referred for conciliation out of time, and for which no application for late referral had been sought or granted. Although the referral was late the conciliating commissioner had issued a certificate of outcome indicating that the dispute remained unresolved. After considering decided case law on the issue, and adopting the approach of the Labour Court in *Bombardier Transportation (Pty) Ltd v Mtiya NO & others* (2010) 31 ILJ 2065 (LC), the arbitrator found that he lacked jurisdiction and advised the applicant union to apply for condonation if it wished to pursue the matter.

## Evidence

The Labour Court in *SA Revenue Services v Commissioner for Conciliation, Mediation & Arbitration & others* (at 249) reviewed and set aside a CCMA award in which the commissioner had taken into account the evidence of the first witness led by the employer and, when that witness failed to implicate the employee party in wrongdoing, had failed properly to weigh up the probabilities and credibility of the evidence of further witnesses led by the employer, which did show such wrongdoing. The court found it clear that a party is not bound by the evidence of its first witness and may call other evidence to contradict that witness on matters relevant to the issue. In *Mdlalose and University of Johannesburg* (at 277) the commissioner noted that the overall onus to prove that a dismissal was fair lay on the employer, but that if the employee denied any guilt and raised a particular defence, the evidentiary burden then shifted to him or her. If the employee failed to discharge that burden, the employer may have discharged the overall onus of proving the dismissal to be fair.





## Costs

The Labour Court considered in *Davidson v Emvest Asset Management (Pty) Ltd* (at 171) that by refusing without good reason to pay certain amounts due to an employee after his resignation, and by subsequently opposing the employee's court application, the employer had abused the court process. The employer was ordered to pay the employee's costs on a punitive scale.

