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Dear *Industrial Law Journal* Subscriber

We take pleasure in presenting the February 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.

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

Juta General Law





HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Appeals to Constitutional Court

The Constitutional Court refused the applicant in *Mbatha v University of Zululand* (at 349) leave to appeal from a judgment of the Labour Appeal Court, in which that court found that the applicant had ceased to be an employee of the respondent university, and had been transferred to another entity by agreement with that party. The CC endorsed the LAC's finding and found that, in any event, the dispute was purely factual and raised no constitutional issues. The court did not accept the applicant's claim that his constitutional right to dignity had been infringed when he had been transferred without his explicit consent, and found that claim to be 'fanciful'.

Dismissal – When an Appropriate Penalty

The Supreme Court of Appeal has now further endorsed earlier judgments of the Labour Court and Labour Appeal Court in which those courts found that dismissal was not an appropriate penalty for an employee who absented herself from work for five weeks without leave in order to complete her training and initiation as a sangoma, to which she had received a calling. In *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others* (at 406) the SCA accepted that the employee genuinely believed that she was sick because she saw visions of her ancestors, and feared that had she not completed the training her health would have been endangered. The court contrasted the approach of conventional medicine, which uses material causation to treat illness, with that of traditional medicine, which generally looks towards the 'spiritual' origin, and expressed the view that SA courts are equipped to deal with disputes arising from conventional medicine, but are not permitted to evaluate the acceptability, logic, or comprehensibility of traditional beliefs. They are concerned only with the sincerity of the adherent's belief and whether it was being invoked for an ulterior motive. The employee's beliefs being sincere, the court endorsed the original commissioner's finding that her failure to obey her employer's order to return to work was justified and reasonable, and that dismissal was not appropriate.

Unfair Discrimination and Affirmative Action

In *Solidarity on behalf of Barnard v SA Police Service (Vereniging van Regslui vir Afrikaans as Amicus Curiae)* (at 416) the Supreme Court of Appeal overturned an earlier decision of the Labour Appeal Court (reported in (2013) 34 ILJ 590 (LAC)) in which the LAC had found that the decision by the national commissioner of the SAPS not to appoint a white female officer to a promotional post, although she had twice been recommended as the best candidate for appointment, did not amount to unfair discrimination. The SCA considered the purpose and the provisions of the Employment Equity Act 55 of 1998 and examined the SAPS' employment equity plan (EEP) and the applicable sections of its National Instruction 1/2004, all of which make provision for affirmative action in the granting of promotions. The court found them designed to assist in the struggle to achieve an egalitarian society, but held that this end could not be achieved by the mechanical application of formulae and numerical targets. It found that the applicant, herself a member of a designated group, had been discriminated against on the ground of race, and that the national commissioner and the SAPS had not discharged the onus to show that the discrimination was fair. In similar vein, in *Solidarity & others v Department of Correctional Services & others (Police & Prisons Civil Rights Union as Amicus Curiae)* (at 504) employees of the respondent department employed in the Western Cape claimed that they had been unfairly discriminated against by not being selected for appointment to the posts that they had applied for, and sought an order declaring that the employer's EEP did not satisfy the requirements of s 20 of the EEA. The Labour Court found that it was not empowered to grant the declarator sought, but after studying s 42 of the Act and the terms of the EEP it concluded that both regional and national demographics must be taken into account when determining





the extent to which qualified people from the different designated groups were equitably represented in the various regions. It was common cause that the department's EEP only took account of national demographics. The court accordingly found that where the department's selection and recruitment process took no cognizance of the regional demographics of the Western Cape this amounted to unfair discrimination against affected employees within the designated groups.

Transfer of Business as a Going Concern

The eThekweni Metropolitan Municipality was not permitted to provide its own bus service, but was statutorily obliged to appoint a public transport operator to provide the service. When the appointed operator terminated its contract and ceased its operations the provincial MEC appointed Transnet to provide the service temporarily pending the appointment of a new operator. In *Transport & Allied Workers Union of SA v Transnet (Pty) Ltd & others* (at 526) the Labour Court held that this did not amount to a transfer of a business as a going concern. The provision of a bus service was not a 'business' within the meaning of s 197 of the LRA 1995, but a statutory obligation. Further, the trade union had failed to show any transfer from the municipality to the first operator, or any subsequent transfer to Transnet.

Employment Relationship

The CCMA commissioner in *Dyssel and Media 24 (Pty) Ltd* (at 534) examined the distinction between the status of an employee and an independent contractor, and concluded that a street vender who was paid a commission to distribute newspapers for sale on a Sunday was an independent contractor, not an employee.

Unfair Dismissal

After refusing to carry out a particular instruction of their employer the employee parties in *Mmolawa & others and Tintinger t/a Beginnings* (at 560) were required to sign a final written warning and a new contract of employment, or leave the employer's premises. They refused to sign, left the premises and claimed that they had been unfairly dismissed. The arbitrating commissioner found that the employer's actions amounted to a dismissal and that as no procedure had been followed, and no reason for dismissal given, the dismissal was unfair. The employee party in *Solidarity on behalf of Kotze and Assmang Iron Ore (Khumani Mine)* (at 566) was dismissed for dishonesty for misrepresenting his IT qualifications in his curriculum vitae. At arbitration it became apparent that the qualifications in question had been incorrectly cited in the employer's advertisement, and did not exist. The employee had explained in his interview the qualifications he in fact did have, and there was no evidence that he intended to mislead his employer. He was reinstated. The arbitrator in *Manikus and Genrec Engineering (Pty) Ltd* (at 581) found that where an employee had been allowed to remain in his employment for seven months after the expiry of his fixed-term contract, his contract was deemed to have been tacitly renewed, but for an indefinite period. The subsequent termination of his employment therefore amounted to a dismissal.

Enforcement of Settlement Agreements

In *SA Post Office Ltd v Communication Workers Union on behalf of Permanent Part-time Employees* (at 455) the Labour Court had granted an order making a settlement agreement between the parties an order of court, and at the same time had referred a dispute concerning the interpretation of the agreement to the CCMA. On appeal the Labour Appeal Court held that the LC has a discretion to make such an order where the agreement is unambiguous and unequivocal, and where the defaulting party has failed to comply with it, but not where it is unclear or ambiguous. Further, once made an order of court the agreement could not be referred to the CCMA in terms of s 24(8) of the LRA 1995 for interpretation.





Enforcement of Reinstatement Order

Noting that a court will generally agree to make an arbitration award an order of court to ensure that it is honoured, unless the award lacks clarity, the Labour Court in *Sejake v Naledi Local Municipality* (at 500) made an award of reinstatement an order of court, although the award did not quantify the amount of backpay due. The court found that backpay is an automatic component of reinstatement and that, where not quantified, it can easily be ascertained by reference to the employee's last payslip.

Interpretation of Collective Agreement

On review in *Cape Clothing Association v De Kock & others* (at 465) the Labour Court found that a clause in a collective agreement was ambiguous and required interpretation in terms of s 24 of the LRA 1995. The arbitrator's finding to the contrary was accordingly set aside. The court further found that the arbitrator's power to interpret its terms included the power to rectify the agreement to reflect the real intention of the parties.

Recognition of Bargaining Agents

The Labour Court refused in *National Union of Mineworkers v Lonmin Platinum comprising Eastern Platinum Ltd & Western Platinum Ltd & another* (at 486) to grant the applicant trade union an urgent interim interdict to prevent the respondent employer from terminating its recognition agreement with the union after it had lost a large number of its members to a rival union, AMCU, and so had lost its majority status as required by the agreement, and its representative status. NUM maintained that many of the revocation orders presented to the employer by AMCU were defective or invalid, and that the employer had failed to apply its mind when verifying the notices. The court found that NUM had not acted timeously when losing members to AMCU, and that it should have demanded and checked the validity of the revocation of membership notices much earlier. The matter was not urgent, and NUM had an alternative remedy before the CCMA, to which it had referred a dispute concerning the interpretation and application of the recognition agreement.

Prescription

In *Concor Holdings (Pty) Ltd v Mazibuko & others* (at 477) the Labour Court examined the application of the Prescription Act 68 of 1969 to the enforcement of arbitration awards, and found the principle of the timeous resolution of labour disputes to be consistent with the timeous enforcement of debts as set out in the Act, and that the dictates of fairness and equity did not trump the provisions of the Act, which had been found to be constitutionally valid. The employee's right to enforce an arbitration award had *therefore* prescribed after three years.

Hearsay Evidence before the CCMA

In *Mahlangu and Premier Foods (Pty) Ltd* (at 545), in which an employee had been dismissed for alleged dishonesty, the only evidence directly linking him to the allegations was hearsay evidence in the form of two statements made by former employees who had left the company and could not be traced. After regard to the Law of Evidence Amendment Act 45 of 1988 and relevant case law the CCMA commissioner found that an arbitrator might rely on hearsay evidence which he was satisfied on proper grounds was reliable. However, he did not place reliance on the statements as the co-employees had shown themselves to be dishonest and their evidence could not be tested.

Practice and Procedure

The High Court in *Weitz v Goodyear SA (Pty) Ltd & others* (at 441), in an action in which the plaintiff claimed damages from his former employer for the loss of his earning capacity, refused to entertain the





action or to establish causation. The court considered whether the plaintiff had made sufficient allegations to establish either legal or factual causation in respect of his claim, and concluded that neither could be determined at the exception stage, and must be determined after hearing evidence.

Cape Clothing Association v De Kock & others (at 465), concerned the interpretation and application of a collective agreement, which had been referred to arbitration in terms of s 24 of the LRA 1995. When the employer party applied to review the award the trade union's representative submitted her own version of events in an answering affidavit. The Labour Court granted the employer's application to strike out the affidavit, finding that it sought to introduce new evidence which had not been placed before the arbitrator when the terms of the agreement were initially considered, and that this was impermissible and unfair. The court further found that the agreement was ambiguous, and that the arbitrator had power to rectify it.

Quote of the Month:

Navsa ADP in *Solidarity on behalf of Barnard v SA Police Service (Vereniging van Regslui vir Afrikaans as Amicus Curiae)* (2014) 35 ILJ 416 (SCA):

'Dealing with race classifications, as is necessary under the EEA, feels almost like a throwback to the grand apartheid design. If we are to achieve success as a nation, each of us has to bear in mind that wherever we are located, particularly those of us who have crossed over from the previous oppressive era into our present democratic order, it will take a continuous and earnest commitment to forging a future that is colour blind.'

