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We take pleasure in presenting the April 2014 issue of the monthly *Industrial Law Journal Preview*, authored by the editors of the *ILJ*: C Cooper, 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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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Process, Outcome and 'Sidumo' — The Test for Review

Following the judgment of the Supreme Court of Appeal in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA), the Labour Appeal Court has once again in *Gold Fields Mining (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* considered the appropriate test for the review of arbitration awards and has emphasized that a review sought on so-called 'process related' grounds is not to be regarded as a different species of review to that postulated in *Sidumo*, rendering an award reviewable without regard to the outcome. A piecemeal approach to such reviews is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the commissioner's decision was one that a reasonable decision maker could make. The court posed five questions that a reviewing court should ask itself when determining the matter. In the appeal before it the commissioner had wrongly concluded that an employee had been dismissed for poor performance, when he had in fact been dismissed for misconduct. The LAC found that this clearly amounted to a gross irregularity in the conduct of the proceedings, but then asked whether, as a result of that categorization, the commissioner's decision was one that could be arrived at by a reasonable decision maker. Finding that it could not, the court set the decision aside.

Powers of the Labour Appeal Court

In *National Union of Metalworkers of SA on behalf of Sinuko v Powertech Transformers (DPM) & others*, the Labour Court had reviewed and set aside an award, relying on only one of several grounds of review raised by the respondent. On appeal the LAC found that ground of review to be incorrect, but then considered whether it could determine the other grounds raised in the court below but not determined, or whether it had to remit the matter to the Labour Court. The LAC doubted the correctness of the approach adopted by the SCA in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2009) 30 ILJ 829 (SCA) and found its statutory powers on appeal to be similar to those of the SCA, and that it had power in terms of s 174(b) of the LRA to determine matters that should normally be remitted to the trial court where special circumstances necessitated this. As remittal would compound an already inordinate delay in finalizing the matter before it, the court itself considered and dismissed the other grounds of review.

Strike Action — Lawfulness of Demand

In *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members & others* the employees of a company providing waste management services to the City of Johannesburg objected to the imposition of mandatory breathalyzer testing of drivers before they received the keys of their trucks, demanded that these measures be prohibited, and gave notice of strike action in accordance with s 64(1)(b) of the LRA on the issue. The Labour Court had found that the demand was not unlawful but that the matter fell within management's prerogative and granted the employer an interim interdict to prevent the strike (see (2014) 35 ILJ 201 (LC)). On the return day a different court found that, although breathalyzer testing fell within the management prerogative, it was nevertheless a matter of mutual interest to both employer and employees on which bargaining could take place, and dismissed the rule nisi (see (2014) 35 ILJ 224 (LC)). On appeal the Labour Appeal Court was required to consider whether the demand concerned a matter of mutual interest, and also whether it would prevent the employer from complying with its obligations in terms of the Occupational Health and Safety Act 85 of 1993, and so was unlawful. The court found that breathalyzer testing was only one of a range of measures open to an employer to detect alcohol consumption, and therefore not the only 'reasonably practicable' way to ensure the safety of its employees and public in terms of the OHS Act. The demand was found not to be unlawful and to concern a matter of mutual interest.





Consultation Prior to Retrenchment

In *National Union of Mineworkers v Anglo American Platinum Ltd*, which concerned the proposed large-scale retrenchment of mineworkers, the parties engaged in an extensive consultation process over a period of some eight months. When they remained unable to reach consensus the employer finally issued notices of termination of employment. The applicant applied for an urgent order declaring the dismissals to be invalid for want of compliance with s 198 or s 198A of the LRA 1995, and sought the employees' reinstatement pending the employer's compliance with a fair consultation procedure. The Labour Court considered the provisions of s 198A(13) and found that it should adopt a holistic approach when judging procedural fairness, avoid a mechanical check-list approach to s 189, and ascertain whether the overall purpose of joint consensus-seeking had been achieved. The court found that on the facts before it the union and employees had frustrated the consultation process in an attempt to delay the retrenchments, and concluded that the consultation process had been fair and that the employer was entitled to bring it to an end and to issue retrenchment notices. The provisions of s 52 of the Mineral and Petroleum Resources Development Act 28 of 2002, which require a mine owner to notify the minister that s 189 consultations are taking place in certain circumstances, were not found to be relevant on the facts before the court.

Organizational Rights and Collective Bargaining

In *Police & Prisons Civil Right Union v Ledwaba NO & others* an unrecognized minority union had concluded an agreement with the Department of Correctional Services to grant it organizational rights although a majority union, POPCRU, had already concluded several collective agreements with the department. When POPCRU objected and referred a dispute for bargaining council arbitration the arbitrator held that the agreement on organizational rights had been validly concluded. On review the Labour Court noted that the process of collective bargaining is made up of organizational rights, the right to strike and the conclusion of collective agreements. As a matter of principle preference must be given to collective agreements with a majority union over organizational rights to which a minority union may be entitled in terms of the LRA. No purpose would be served by affording a minority union such rights where collective agreements already regulate the relationship between the employer and a majority union. The department could therefore not conclude a valid agreement on organizational rights with the minority union.

Temporary Employment Services

The Labour Court in *Labour Group & others v SA Dorper (Pty) Ltd* found that it lacked jurisdiction to litigate a dispute between a TES and its client concerning the lawfulness of the client's cancellation of the agreement between them. The court found that s 198 of the LRA 1995, which regulates the relationship between a TES, its employees and the client, cannot be interpreted to include the protection of the commercial rights of the TES and the client in terms of the labour broking contract. The court only has jurisdiction where the protection of the interests of the employees is necessary.

Demarcation Disputes

The arbitrating commissioner in *Dewdev (Pty) Ltd t/a Bulkbag Manufacturers v Bargaining Council for the Canvas Goods Industry, Witwatersrand & Pretoria & others* had ruled in demarcation proceedings that the manufacture of bulk bags from woven polypropylene (a form of plastic) fell within the registered scope of the canvas goods industry. On review the Labour Court considered the approach adopted by earlier review courts and agreed that a demarcation involves considerations of fact, law and social policy, and that deference must be given by the court to the expertise of the commissioner. In demarcation awards a wide range of approaches and outcomes is inevitable, and the court must only interfere where the boundary of reasonableness is crossed. In the case before it the court found that the commissioner's interpretation of the text of the industry definition was reasonable, and dismissed the application to review. In *National Textile Bargaining Council v De Kock NO & others*, the Labour Court similarly acknowledged that it should show due deference before reviewing a demarcation award.





The court held there to be two phases to a demarcation, the first being a mechanical comparison of jobs, and the second a consideration of collective bargaining practices and structures and socio-economic considerations. In this case the court found that the commissioner had failed to engage in the second phase of the enquiry, and set the award aside.

Exemption from Bargaining Council Agreement

The respondent bargaining council in *Subaru Pretoria (Pty) Ltd v Motor Industry Bargaining Council & others* granted the applicant employer exemption from its provident fund agreement on the understanding that it had an in-house fund that would provide its employees with adequate and suitable alternative retirement benefits. The council did not regard retirement annuity funds as such a suitable alternative. When it transpired that the in-house fund was in fact a retirement annuity fund the council's exemption committee withdrew the exemption and that decision was upheld on an internal appeal. The applicant sought to review these decisions on the grounds that they were irregular and unreasonable. The Labour Court refused to set aside the decision, finding that in principle an official may take an administrative decision with reference to a policy or guideline as long as there is no rigid application of the policy or guideline. In the case before it the council had applied its mind to the matter and had exercised its discretion properly and reasonably.

Unfair Dismissal Disputes

In *Chipu and Central Technical Services (Pty) Ltd* the commissioner found the dismissal for poor work performance of an artisan who had twice failed competence assessment tests to be fair. The employer could not be expected to provide the employee with additional training when he had been hired as a properly qualified artisan. The commissioner in *Dube and Sentech Ltd* had to consider whether an employee who had resigned had successfully met the legal requirements to show that he had been constructively dismissed, and thereafter had to decide whether on the evidence the applicant had discharged that burden of proof. The commissioner found that the employee had been treated improperly and was justified in viewing his suspension and unwarranted disciplinary action as unfair, but that other avenues were open to him to air his grievances, and the employer's conduct did not leave the employee with no alternative but to terminate his employment. He had therefore not proved constructive dismissal.

Requirements to Found Urgent Interim Interdict

The Labour Appeal Court set aside an urgent interim interdict granted by the Labour Court in *Palace Group Investments (Pty) Ltd & another v Mackie*, finding that the respondent had failed in his supporting affidavit to set out sufficient facts on which he relied to enable the court to assess whether he had made out a prima facie case entitling him to the relief claimed. The court further noted that it is not an inflexible rule that an appeal cannot succeed against an interim interdict, and found that the interests of justice dictated that the appeal should be considered, even though the order was of an interim nature.

Disciplinary Code and Procedure

The respondent employee in *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* was initially charged with fraud at a disciplinary enquiry, but was found not guilty. It was later found that the documents on which she had relied at the enquiry had been forged, and she was charged with misconduct related to forgery and dismissed. At arbitration the commissioner found that she had been subjected to double jeopardy and ordered her reinstatement. On review the Labour Court examined the concept of double jeopardy and found that the first acts of misconduct on which she had been exonerated were clearly distinguishable from the second, notwithstanding the similarities in their facts and role players. The commissioner had therefore misdirected himself by conflating them, and his award was set aside.

The employee party in *Seakamela and Magalies Water* was dismissed for gross insubordination and refusing a reasonable instruction. At CCMA arbitration the employee challenged the procedural fairness of numerous aspects of his disciplinary enquiry, including alleged bias, the splitting of charges





and not allowing the employee's attorney to listen to the whole of an audio recording, all of which were considered in turn and were found to be reasonable in the circumstances of the case, and not to be procedurally unfair.

Evidence

In *United Association of SA on behalf of Benade and Driefontein Gold Mine (KDC West)—A Division of Sibanye Gold Ltd* the commissioner considered when a document handed in as evidence should be regarded as privileged, and refused to allow into evidence a document prepared by the employer's legal representatives after being consulted for legal advice. After considering the extent to which circumstantial evidence could be accepted to prove the commission of an offence by an employee, the commissioner in *United Association of SA on behalf of Msibi and Lonmin Platinum* noted that he had to look at the totality of the evidence and weigh it on a balance of probabilities. An inference had to be drawn through a careful survey of the connection between the facts and their relationship to the offence alleged to have been committed. In the matter before him he found that the allegations against the employee amounted to mere conjecture and he was not prepared to draw an inference of theft from the evidence submitted.

Quote of the Month:

Not awarded.

