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We take pleasure in presenting the May 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.

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## HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

### Regulation of Gatherings Act 205 of 1993

The High Court in *Mahlangu v SA Transport & Allied Workers Union, Passenger Rail Agency of SA & another, Third Parties* (at 1193) considered the scope of the statutory liability imposed on a trade union in terms of s 11 of the Regulation of Gatherings Act 1993 for injury or damage arising from the actions of its members while attending a 'gathering' convened by the union. The court held that it could not have been the intention of the legislature to hold an organization liable for the conduct of those members who decided to engage in acts of violence long before they reached the designated place of the gathering, and which it could not foresee. The court accordingly would not hold the respondent union liable for the actions of certain members who decided to entice a fellow worker to board a train at Springs, and thereafter assaulted her and threw her from the train while travelling to a union gathering due to be held in Johannesburg.

### Labour Court Jurisdiction

In *Aucamp v SA Revenue Service* (at 1217) the applicant referred a dispute to the Labour Court in terms of s 77(3) of the Basic Conditions of Employment Act 75 of 1997, seeking an order that the respondent's failure to award him a bonus, in accordance with the terms of a collective agreement which governed his conditions of employment, amounted to an unfair labour practice. The court found that there were two issues in dispute, the first an alleged unfair labour practice and the second the interpretation and application of a collective agreement. In neither case did the court have jurisdiction to adjudicate the matter. An unfair labour practice should be referred to the CCMA for arbitration, while the collective agreement provided that disputes about its provisions should be resolved through private arbitration if conciliation failed. The court in *Overstrand Municipality v Magerman NO & another* (at 1366) considered a long line of court decisions dealing with the jurisdiction of the Labour Court to adjudicate disputes involving public service employees, and in particular considered whether the decisions of disciplinary chairpersons in the public service constituted administrative action for the purposes of the Promotion of Administrative Justice Act 3 of 2000. The court consequently held that it had jurisdiction in terms of s 158(1)(h) of the LRA 1995 to review and set aside the sanction imposed on a municipal employee by the chairperson of an internal disciplinary enquiry in the public service. Similarly, in *SA Municipal Workers Union on behalf of Members v Kopanong Local Municipality* (at 1378) the court confirmed its jurisdiction to entertain an urgent application by employees to ensure compliance by a local municipality with its own policy regulations.

### Strikes and Lock-outs

The Labour Court examined the limitations placed on the right to strike by ss 64 and 65 of the LRA in *Transnet SOC Ltd v National Transport Movement & others* (at 1418), and in particular considered whether a minority trade union that was not a party to a collective agreement, and that did not meet the threshold levels set by that agreement for recognition, could nevertheless demand to be granted organizational rights and declare a protected strike over the issue. In the case before the court the employer had entered into a collective agreement with four trade unions, all of which were minority unions, which fixed the threshold for recognition at 30% in the bargaining unit. The agreement had not been extended to non-parties. The court found that the agreement was not an agreement as contemplated in s 18 of the LRA, which applied only to an agreement between a single majority union and an employer, and that there was no express limitation in either s 64 or s 65 precluding a minority union demanding those organizational rights from exercising its right to strike over the issue. The proposed strike was therefore protected.

In *United Transport & Allied Trade Union/SA Railways & Harbours Union & others v Autopax Passenger Services (SOC) Ltd & another* (at 1425) the Labour Court considered the purpose of a lock-out, and specifically whether, where the members of one union had embarked on an unprotected strike, the





continued to tender their services. The court found that the lock-out was not simply to compel specific employees to accept a specific offer but was part of the collective bargaining process, and was a mechanism to resolve the issue in dispute. The employer was entitled to consider all employees in the bargaining unit as parties to the dispute, including the non-striking workers, and to issue its lock-out notice accordingly.

### **The Prescription of Awards**

The Labour Court in *Cellucity (Pty) Ltd v Communication Workers Union on behalf of Peters* (at 1237) reaffirmed its view, as expressed in its earlier decision in *Coetzee & others v Member of the Executive Council of the Provincial Government of the Western Cape & others* (2013) 34 ILJ 2865 (LC), that the Prescription Act 68 of 1969 is incompatible with the architecture of the LRA 1995, and that its application would create inequalities between litigants using different routes to resolve their disputes, and would be unworkable where disputes move between tribunal and court and vice versa. The court refused to set aside a writ of execution on the basis that the award on which it was based had prescribed. In *Circuit Breakers Industries Ltd v National Union of Metalworkers of SA on behalf of Radebe & others* (at 1261) the court accepted that the Prescription Act applied to employment law, but held that it only did so in respect of awards of compensation, and did not apply to awards of reinstatement, which did not constitute 'debts' for the purposes of the Act, but were effectively orders for specific performance.

### **Extension of a Collective Agreement to Non-parties**

In *Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co Ltd & others v Association of Mineworkers & Construction Union & others* (at 1243) the Chamber of Mines, acting for its member mining companies, concluded a collective agreement with three trade unions representing the majority of the total workforce. The agreement was extended to non-parties and prohibited strike action. The respondent union, AMCU, was not a party to the agreement and claimed the right to negotiate terms and conditions of employment for its own members, and to strike on the issue. After considering the wording of s 23(1)(d) of the LRA regarding the extension of collective agreements, and the definition of a 'workplace' in s 213, the Labour Court concluded that, subject to the provisos contained in s 23(1)(d), a 'workplace' constituted all the places where the employees of an employer worked, and that each mine was not, as AMCU argued, a separate workplace in which it might have majority membership. This, the court found, upheld the principle of majoritarianism, and the chamber was entitled to the interim interdict which it sought.

### **Basic Conditions of Employment Act 75 of 1997**

The applicant employee in *Hamandawana v Dispute Resolution Centre & others* (at 1312) sought to review an award in which the arbitrator had found that he had not been dismissed, but had been employed on consecutive fixed term contracts which had expired. He had refused to sign the contracts in question and argued that his employment was permanent, and that the arbitrator's finding to the contrary was one that a reasonable arbitrator could not have reached. The Labour Court considered the wording of the presumption of employment contained in s 83A of the BCEA 1997 and found that it did not deem indefinite employment to be the norm in the absence of a written agreement, but was neutral on the issue. The arbitrator's finding on the evidence that the employment was for a fixed term was therefore not unreasonable.

After the termination of his employment the applicant in *Ludick v Rural Maintenance (Pty) Ltd* (at 1322) claimed payment for leave accrued but not taken over two successive leave cycles, while the employer maintained that he had forfeited both cycles of leave in terms of his employment contract, which provided that leave must be taken within two months of its accrual. The court examined the wording of ss 20(2) and 40(b) of the BCEA, and held that the Act contemplates payment only for leave accrued but not taken in the current and immediately preceding leave cycle. The applicant was entitled to payment only in respect of one leave cycle, but had not forfeited that leave in terms of his employment contract, the terms of which were less favourable than those stipulated in the BCEA.





## Breach of Contract

The respondent in *Motaung v Wits University (School of Education)* (at 1329) erroneously terminated the applicant's five-year contract of employment after one year but, on realizing its mistake, apologized and undertook to honour its obligations. The applicant rejected the offer and instituted a claim for four years' salary for breach of contract. The Labour Court dismissed her claim, finding that she had a choice either to accept the respondent's repudiation and bring the contract to an end or to demand specific performance. She had done neither and the contract remained in place. In *Ngubeni v National Youth Development Agency & another* (at 1356) clause 10 of the applicant's contract of employment prescribed that his employment should only be terminated after a fair disciplinary procedure had established that he was guilty of misconduct or of certain other conduct that would warrant such termination. When his employer finally dismissed him before the end of a lengthy and drawn out disciplinary enquiry he approached the Labour Court in terms of s 77(3) of the BCEA, claiming a breach of contract and seeking the restoration of his employment pending completion of the enquiry. The court accepted the employee's argument, and granted an order of specific performance, requiring the employer to reinstate him pending compliance with the terms of clause 10. In *Stoop & another v Rand Water* (at 1391), in an action by two employees for unfair dismissal, the employer instituted counter claims for damages against both employees arising from their fraudulent actions, which breached their fiduciary duties towards their employer in terms of their contracts of employment, and which caused the employer damage and financial loss. The Labour Court found the counterclaims to be competent and, after investigating the allegations against the employees, found that both had committed acts of fraud and corruption and awarded substantial damages, holding them jointly and severally liable.

## Reinstatement

In *Myers v National Commissioner of the SA Police Service & another* (at 1340) the Supreme Court of Appeal had, in earlier litigation, found the applicant's dismissal to have been unfair, and had ordered his reinstatement (see (2013) 34 ILJ 1729 (SCA)). The respondents maintained that that position had since been amalgamated with another and upgraded, and offered the applicant employment in another position at the same rank and salary that he had held at the time of his dismissal. In proceedings for an order holding the respondents in contempt of court the Labour Court considered the meaning of 'reinstatement' as defined in s 193(1) of the LRA, and distinguished it from re-employment. Reinstatement was aimed at placing the employee in the position he or she would have been in, but for the unfair dismissal. It did not afford the employer a discretion. If that post had since been upgraded he would have remained the incumbent of that post as restructured. The respondents were ordered to reinstate the applicant into the restructured position with retrospective effect. In *National Union of Metalworkers of SA on behalf of Fohlisa & others v Hendor Mining Supplies – A Division of Marschalk Beleggings (Pty) Ltd* (at 1347) the Supreme Court of Appeal had also endorsed a Labour Court's order for reinstatement, which became immediately enforceable. In a further application the Labour Court granted an order declaring the employees to be entitled to backpay from the date of the original order to the date of the order by the SCA.

## Practice and Procedure

During a protected strike the applicant employer in *Ciro Beverage Solutions (Pty) Ltd v SA Transport & Allied Workers Union & others* (at 1275) obtained an urgent order interdicting certain identified employees from engaging in violent and unlawful conduct. When the employees failed to comply, the employer returned to the Labour Court for an order of contempt of court coupled with an order of imprisonment or the imposition of a fine. The court considered the test for establishing contempt, but refused the order. It found that establishing service of the original order was critical, and that service on the employees' trade union and shop stewards and by posting it on the entrance to the employer's premises was insufficient. It was plausible that the employees themselves had no or insufficient knowledge that it was directed to them personally. Similarly, in *Myers v National Commissioner of the SA Police Service & another* (at 1340) the court considered the test for establishing contempt and found the respondent's failure to comply with an order not to have been willful or mala fide.





*Ekurhuleni Metropolitan Municipality v Spies & others* (at 1283) concerned an application to review both an arbitration award made two years previously and a more recent ruling which had varied that award by quantifying the amounts awarded. The court refused to review the original award because of undue delay in bringing the application. After considering the purpose of s 144(b) of the LRA the court granted the application to review the variation ruling, but only to the extent of remitting the matter to the appropriate bargaining council to recalculate the amounts awarded.

**Quote of the Month:**

Tlhotlhemaje AJ in *Motaung v Wits University (School of Education)* (2014) 35 ILJ 1329 (LC):  
'[E]mployers are not infallible, and mistakes will be made in the workplace that cause employees inconvenience and irritations. Unfortunately this is the nature of the world of work. However, where an employer in such circumstances acknowledges and owns up to its mistakes and, within a reasonable time, unreservedly apologizes and makes reasonable and genuine attempts to rectify those mistakes in order to place the employee in exactly the same or similar position he or she would have been, it would in all the circumstances be foolhardy for that employee unreasonably to rebuff such overtures, be opportunistic and run to court.'

