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We take pleasure in presenting the June 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

Are Magistrates Employees of the State?

The Supreme Court of Appeal was required to answer this question in *President of SA & others v Reinecke* (at 1485), in which a magistrate claimed damages before the High Court for an alleged constructive dismissal, giving rise to a breach of his contract of employment. After tracing the history of the position of magistrates, the court found that they have not, since the passing of the Magistrates Act 90 of 1993, ceased to be employees of the state, but that the applicant's appointment was overlain with elements derived not from contract but from that Act, and that he should rather have relied on the public law remedies that were open to him, not on a contractual remedy.

Settlement Agreements

The High Court in *Lawrie v Nursing Response CC & others* (at 1498) refused to declare a settlement agreement arrived at before the CCMA to be null and void on the ground that it was fraudulent and contrary to public policy, and found that the Labour Court has exclusive jurisdiction to rectify or to cancel such disputes.

Protected Disclosures Act 26 of 2000

The Labour Court in *Independent Municipal & Allied Trade Union on behalf of Bezuidenhout v Witzenberg Municipality & others* (at 1579) considered whether an employee, claiming to have been subjected to an unfair labour practice in terms of s 186(2)(d) of the LRA 1995 after making a protected disclosure, could elect either to refer her dispute to the relevant bargaining council for arbitration or to the Labour Court. The court found that s 186(2)(d) had been added to the LRA after the promulgation of the Protected Disclosures Act 26 of 2000 and that while the unfair labour practices contained in s 186(2)(a), (b) and (c) could be referred to arbitration, those contemplated in s 186(2)(d) had to be adjudicated by the Labour Court.

Collective Agreements

The parties in *Independent Municipal & Allied Trade Union & others v eThekweni Municipality & others* (at 1572) entered into a collective agreement which provided, as a deadlock breaking mechanism, that if they could not reach consensus on the placement of staff, the employer's proposals should be applied. When the municipality later rescinded certain placements made erroneously, a bargaining council arbitrator ruled that the collective agreement did not prevent it from exercising its managerial discretion to manage the workplace and to rescind the placements. The Labour Court upheld this decision, finding that the employer's common-law rights had only been curbed to the extent expressly outlined in the agreement. In *Public Servants Association of SA on behalf of Malepe v Department of Justice & Constitutional Development & another* (at 1622) the parties referred a dispute concerning the interpretation and application of a collective agreement for arbitration. The arbitrator ruled that in terms of the agreement a bonus was payable to a certain employee, and ordered that it be paid together with interest from the date on which it became due. The Labour Court agreed and made the award an order of court. It pointed out that s 33A(9) of the LRA 1995 applies not only to collective agreement disputes initiated by bargaining councils but also to awards ordering the payment of amounts due and payable arising from disputes concerning the interpretation and application of collective agreements.

Functions and Duties of Commissioners and Arbitrators

In *Anglo Operations Ltd (Kriel Colliery) v Commission for Conciliation, Mediation & Arbitration & others* (at 1520) the Labour Court explored the extent of an arbitrating commissioner's duty to provide guidance and assistance to lay litigants, with reference to case law on the issue. The court found that the extent of the duty is generally determined on a number of considerations and will vary according to the circumstances. A court should not too readily impute a duty to intervene, and in the case before it the commissioner's failure to do so did not amount to a reviewable irregularity. The court similarly, in *Baur*





Research CC v Commission for Conciliation, Mediation & Arbitration & others (at 1528), restated the conduct expected of commissioners with reference to case law, and in this case found that a commissioner who had allowed an employee legal representation but had failed to advise the employer that it had a similar right had deprived the employer of a fair hearing, and had committed a reviewable irregularity. The court noted that the Labour Court exercises an overall supervisory role over arbitrations by the CCMA.

In *Chabalala v Metal & Engineering Industries Bargaining Council & others* (at 1546) the court expressed extreme criticism of the conduct of a bargaining council arbitrator who, although granted a discretion in terms of s 138(1) of the LRA 1995 to conduct proceedings in a manner that he saw fit, the court found had not been granted a licence to descend into the arena and to act with bias towards one party, so denying the other a fair hearing. Again the court referred to its overall supervisory role over the conduct of arbitrations.

The CCMA's Jurisdiction

In *Jacobs and Monash SA* (at 1702) the applicant employee referred both an unfair labour practice dispute, resulting from an unfair demotion, and a constructive dismissal dispute to the CCMA simultaneously. The disputes arose from the same set of facts. The commissioner found that, while it was possible for an unfair demotion to result in a constructive dismissal, the employee must elect which remedy to pursue. It was an alien concept in law for the CCMA to determine the two disputes simultaneously, and the employee could not seek both reinstatement for the unfair labour practice and compensation for the constructive dismissal.

The Review of Arbitration Awards

The Labour Court was asked to review and set aside the credibility findings of a commissioner in *Solidarity on behalf of Van Zyl v KPMG Services (Pty) Ltd & others* (at 1656). The court noted that when presented with irreconcilable disputes of fact the commissioner's primary task was to resolve the conflicting versions on a balance of probabilities. His failure to make a finding on the credibility of every witness was not a fatal flaw entitling a party to review the award. Complaints about the assessment of evidence were normally bound up in an attack on the overall reasonableness of an award, and did not in themselves constitute separate grounds of review.

Lifting the Corporate Veil

In proceedings involving an alleged unfair retrenchment the Labour Court was asked in *Mohlotsane v Mobile Telephone Network (Pty) Ltd* (at 1595) to lift the corporate veil between the employer and its holding company, which had taken the steps that had necessitated the retrenchment. Although noting that the holding company appeared to have full control over employment relations at the employer company, the court refused to lift the veil because the holding company had not been joined in the proceedings and was not given the opportunity to be heard.

Employment Relationship

The Labour Court had to consider in *Universal Church of the Kingdom of God v Commission for Conciliation, Mediation & Arbitration & others* (at 1678) whether the ordained pastor of a church fell within the definition of 'employee' in terms of the LRA 1995. The court had reference to earlier judgments both in South African and English law in which ministers of religion had not been considered to be employees, but noted that these cases were decided before the creation of the presumption of employment in s 200A of the LRA, and were therefore distinguishable. The court found that almost all the presumptions of employment outlined in s 200A applied to the pastor's situation, and that he was an employee of his church. This judgment is being taken on appeal.





Renewal of Fixed-term Contracts

The CCMA commissioner in *Shiburi and Bureau of Standards* (at 1740) found that the applicant employee had not shown that he had a reasonable expectation that his fixed-term contract would be renewed after its expiry. In any event, in terms of recent case law, he could not rely on s 186(1)(b) of the LRA 1995 if his claim was that he expected permanent employment on the expiry of his contract.

Demand for Dismissal by Third Party

In *Makwela and Unilever* (at 1733) the employee party had been dismissed on the grounds of operational requirements after a customer had demanded his dismissal. The CCMA commissioner found that the retrenchment was a fiction used by the employer to side step the problems created by the customer, and that the dismissal was unfair. The employee was awarded compensation.

Disciplinary Code and Procedure

In disciplinary proceedings the employee party in *Association of Mineworkers & Construction Union on behalf of Molefe and Impala Platinum Ltd* (at 1690) was found not to have committed the two offences with which she was charged, and was instead dismissed on a new charge formulated by the chairperson of the enquiry. At CCMA arbitration the commissioner found that the chairperson had overstepped his mandate and shown bias, and that her dismissal was unfair. Similarly, in *Kruger and Aquarius Platinum SA* (at 1707) the commissioner found that, by discussing the case of an employee with his manager before the start of disciplinary proceedings the chairperson had created a reasonable perception of bias, so rendering the employee's subsequent dismissal unfair. In *Lesole and Johannesburg Social Housing Co (Pty) Ltd* (at 1723) the employee party complained that one of the charges on which he was dismissed did not appear in the employer's disciplinary code and that the employer had not complied with the code in several respects in the disciplinary proceedings. The commissioner found that the code was sufficiently broad to encompass the charges brought against the employee, but that the employer had not led any evidence to prove that the employee had committed the alleged misconduct. Dismissal could thus not be justified.

Compensation

The Labour Court considered the provisions of s 193(1)(c), s 194 and s 195 of the LRA 1995 in *Public Servants Association on behalf of Mbiza v Office of the Presidency & others* (at 1628) in order to determine the appropriate compensation for an employee who the court found had been substantively unfairly dismissed when his contract was terminated prematurely, but who had been paid out for the balance of his fixed-term contract. The court found it clear that compensation could not simply be equated to damages and was in addition to any amount that the employee might be entitled to in terms of his contract of employment.

Enforcement of Judgments Pending Appeal

In *Solidarity & others v Department of Correctional Services & others* (at 1647) the Labour Court had ordered the respondent department to take both regional and national demographics into account when setting employment equity targets for its work force (see (2014) 35 ILJ 504 (LC)). When the department refused to give effect to the judgment pending an appeal the applicant union sought an urgent order to enforce the judgment pending the appeal. The court noted that it had a discretion whether to enforce the order and listed the factors to be considered. It found that the balance of convenience favoured the applicants and that there would be no prejudice to the department, and granted the order.

Practice and Procedure

The employee parties in *Nature's Choice Products (Pty) Ltd v Food & Allied Workers Union & others* (at 1512) claimed before the Labour Court that they had been unfairly retrenched and, when the employer failed to respond to their claim, applied for a default judgment against it. The employer only became aware of the employees' claim when it received the application for default judgment. Its own application for condonation of its late reply was refused by the court. On appeal the Labour Appeal Court considered whether the employer had dealt with its prospects of success in its application, and found that it had

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done so because its prospects were fully set out in its response, which was specifically incorporated into the application for condonation. The employer's prospects appeared to be good, and the late filing should have been condoned. The Labour Court granted the stay of a writ of execution obtained by the employee party in *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner & others* (at 1672) pending the hearing of an application by the employer to review an award in the employee's favour. The employer had failed to file the record within the period prescribed in the Labour Court Practice Manual. The court considered the status of practice manuals, and found that although the manual was silent on the issue of condonation, application for condonation was inferred. The findings in the award were open to question and not to grant a stay of execution would occasion an injustice to the employer.

In *Engen Basson's Service Station v Vanqa* (at 1568) the Labour Court set aside a writ of execution at the instance of the employer, finding that the writ was incompetent as it did not quantify the judgment debt or specify how the amount claimed had been calculated. In an application by employees to set aside a settlement agreement in *Langa & another v Skyline Global Logistics & others* (at 1584) the court dismissed an application by the employer to strike out sections of the employees' founding affidavit which disclosed what had happened during the conciliation proceedings that had led to the settlement. The court found that it had a discretion in terms of s 126(3) of the LRA 1995 to permit such disclosure, that the employer would not suffer prejudice, and that striking out those sections would prevent the employees from having their case properly determined by the court.

Costs

In *Molepo v Passenger Rail Authority of SA* (at 1605) the respondent sought leave to appeal an order handed down earlier by the Labour Court. When the application was heard the court noted that all the grounds of appeal relied on were false. Leave to appeal was refused and, to mark its displeasure, the court ordered the attorney who had drafted the papers, and who had not been present when the original order was handed down, to pay the costs of the application *de bonis propriis*. Similarly, in *Passenger Rail Authority of SA v Commission for Conciliation, Mediation & Arbitration & others* (at 1609) the applicant employer, a public body, applied unsuccessfully to review an arbitration award made in favour of an employee, and the court found the litigation to have been totally ill-founded. After commenting that there were bounds within which public bodies should be allowed to litigate at public expense, and reviewing the part played by the chief executive officer of the applicant in the litigation proceedings, the court ordered the CEO to pay the costs of the application in his personal capacity. In *SA Airways Technical (SOC) Ltd v SA Transport & Allied Workers Union & others* (at 1638), in which striking workers breached picketing rules and engaged in violent and destructive behaviour, the employer obtained an interim order interdicting such unlawful conduct. By the return date the strike had ended and the employer requested that the rule nisi be discharged, and sought a costs order against the union. The court granted the order for costs, even though the union had consented to the interim order, finding that it was the union's and employees' actions that had caused the employer to bring the action in the first place.

In *Sun International (Pty) Ltd t/a The Table Bay v Commission for Conciliation, Mediation & Arbitration & others* (at 1666) the employee party applied for leave to appeal against a default judgment granted in favour of the employer after the employee had withdrawn his opposition to the employer's application for the review of an award in the employee's favour. He later withdrew his application for leave to appeal but without tendering costs. The court found that the employee had no right to seek leave to appeal. The default judgment was not appealable and the employee had not set out the grounds for the appeal. The court recounted the factors to be taken into account when deciding whether to award costs in any particular matter, and awarded the employer its costs, finding the employee's conduct to be unreasonable and an abuse of the court process.

Quote of the Month:

Steenkamp J in *Universal Church of the Kingdom of God v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 1678 (LC):

'On a conspectus of all the facts, I am not persuaded that the [applicant] has succeeded in rebutting the presumption [of employment] contained in s 200A of the LRA. To paraphrase Lady Hale in *Preston*, everything in this relationship looks like an employment relationship. If it looks like a duck, walks like a duck and quacks like a duck, it probably is one.'

