



## INDUSTRIAL LAW JOURNAL PREVIEW

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We take pleasure in presenting the November 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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## HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

### Unfair Discrimination and Affirmative Action

The Constitutional Court has now in *SA Police Service v Solidarity on behalf of Barnard (Police & Prisons Civil Rights Union as Amicus Curiae)* (at 2981) brought litigation between a white female police officer and the SAPS to a close by upholding the SAPS' appeal against the decision of the Supreme Court of Appeal (reported at (2014) 35 ILJ 416 (SCA)) and restoring the earlier order of the Labour Appeal Court (reported at (2013) 34 ILJ 590 (LAC)), which held that the SAPS did not unfairly discriminate against the officer when it failed to appoint her to a promotional position. The CC undertook an exhaustive enquiry into the aims and objectives of the Employment Equity Act 55 of 1998, and of other restitutionary measures contemplated in s 9(2) of the Constitution and found that the SCA had misconceived the issue before it. In particular, the validity of the SAPS' employment equity plan had never been challenged, and there was no presumption of unfairness and no onus on the SAPS to show that it had not unfairly discriminated against the police officer. Certain members of the court addressed differing aspects of the applicable law, but all concurred in upholding the appeal.

### Collective Bargaining — The Definition of 'Matters of Mutual Interest'

In *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA & others* (at 3241) the Labour Court undertook a detailed examination of the history and development of the term 'matters of mutual interest' both in case law and in statutory provisions, and noted that the phrase is not defined in the LRA 1995. The court did not accept the employer's suggestion that the term be interpreted to include matters calculated to promote the common good of the enterprise, and found that the term ultimately serves to distinguish disputes that concern the socio-economic interest of workers from purely political disputes for which the LRA does not afford a right to strike or lock-out. Briefly, it must concern the employment relationship. Considering the union party's demands in this light the court found that all but one, clearly concerned matters of mutual interest, and so could be the subject of protected strike action.

### Interpretation and Application of Collective Agreements

The Labour Appeal Court upheld an arbitrator's interpretation of a collective agreement in *Western Cape Department of Health v Van Wyk & others* (at 3078), finding that she had authority, in the absence of agreement on the matter, to determine how the agreement should be interpreted and applied, and that she had done so taking into account the primary objects of the LRA 1995, which were to promote the effective, fair and speedy resolution of labour disputes, and had adopted an interpretation that was fair to both parties. In *Moir & others v Autopax Passenger Services (Pty) Ltd t/a Translux & City-to-City* (at 3199) the parties concluded an agreement settling a dispute arising out of unprotected strike action, which provided that any further disputes over the issue be referred to private arbitration. The Labour Court found that it lacked jurisdiction to consider a subsequent unfair dismissal dispute arising from the strike; that the dispute in fact concerned the interpretation and application of a collective agreement, and that it should be referred to the CCMA in terms of s 24 of the LRA 1995. In *National Union of Metalworkers of SA on behalf of Members v Lear Sewing (Pty) Ltd* (at 3216) the court distinguished between a 'contract' and a 'collective agreement' and held that a collective agreement for the payment of a production bonus could not be equated with a contract for the purposes of s 5(4) of the LRA 1995. To extend the meaning of 'contract' to include a collective agreement would make collective bargaining unworkable.

### The Extension of Collective Agreements

The Labour Court 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 3111) considered the implications of a collective agreement that had been extended to non-parties in terms of s 23 of the LRA





1995, and the constitutionality of such an agreement. At issue was whether a non-party trade union was bound by the agreement, having regard to the meaning of a 'workplace' in s 23(1)(d). The court found that all the operations carried on by each applicant employer in different places constituted a single 'workplace', and that the agreement had therefore been validly extended. The non-party union was therefore bound by the agreement, including a peace clause that prohibited all those bound thereby from striking.

### **Bargaining Levels**

In *CSS Tactical (Pty) Ltd v Security Officers Civil Rights & Allied Workers Union & others* (at 3140) the employers and trade union parties in the private security sector traditionally negotiated terms and conditions within their sector at national level, and placed a memorandum of agreement setting out their recommendations before the Minister of Labour for consideration prior to the publication of a sectoral determination. When the applicant's employees proposed to take strike action over matters covered by the memorandum the Labour Court held that they were entitled to do so. The memorandum did not prohibit plant level bargaining and was clearly intended only to establish minimum terms and conditions of employment, not actual wage levels.

### **Strikes — Protected and Unprotected**

*Air Chefs (Pty) Ltd v SA Transport & Allied Workers Union & others* (at 3088) concerned a demand by employees for the implementation of an in-house job grading exercise that would have the effect of raising the wage levels of some employees. The wages of the employees were subject to a binding bargaining council agreement. When they proposed strike action over their demand the Labour Court granted their employer an interdict, finding that their demand was a matter of mutual interest that could not be negotiated at company level, and that the strike would be unprotected. In *Imperial Group (Pty) Ltd t/a Imperial Cargo Solutions v SA Transport & Allied Workers Union & others (1)* (at 3154) the court considered the purpose of a status quo notice to restore terms and conditions of employment in terms of s 64(4) of the LRA 1995, and held it to fulfil the same purpose as a strike notice. It must therefore be clear and unambiguous and, where such a notice was not clear, the employer was entitled to interdict the proposed strike pending conciliation of the matter. In *Imperial Group (Pty) Ltd t/a Imperial Cargo Solutions v SA Transport & Allied Workers Union & others (2)* (at 3162), after the expiry of the conciliation period and as the employer had ignored the status quo call, the court held that the union was entitled to strike in support of its original demands.

During the course of a protracted protected strike, in *Association of Mineworkers & Construction Union v Lonmin Platinum (comprising Eastern Platinum Ltd & Western Platinum Ltd) & others* (at 3097), the Labour Court refused to grant the union an urgent application to interdict the employer party from communicating directly with its employees by SMS, urging them to accept its latest offer and return to work. The court found that the matter could not be equated with an application to protect personal safety or prevent criminal acts, and struck the matter off the roll for lack of urgency. The employees in *Modibedi & others v Medupi Fabrication (Pty) Ltd* (at 3171) embarked on an unprotected strike in contravention of an earlier 'peace agreement' with their employer and continued to make numerous and unreasonable demands. The court held that their behaviour had made a continued employment relationship intolerable and that their dismissal after a disciplinary hearing which they refused to attend was substantively and procedurally fair.

The court had to consider the substantive fairness of dismissals for taking part in an unprotected strike in *National Union of Metalworkers & others v Lectropower (Pty) Ltd* (at 3205), and ruled that this should be determined in two stages. Both items 6 and 7 of the Code of Good Practice: Dismissal had to be considered. Although the dismissal might meet the requirements of item 6 it might still not meet those of item 7. On the facts before it the court found the employer's decision to dismiss to have been precipitate,





and ordered the reinstatement of the strikers, but not of those who had misconducted themselves during the strike.

### **The Review of Demarcation Awards**

In demarcation proceedings in *SA Municipal Workers Union v Syntell (Pty) Ltd & others* (at 3059), after hearing both parties the commissioner prepared a draft award and submitted it to NEDLAC for comment, as required by s 62(7) of the LRA. NEDLAC criticized the draft and, after further consideration, the commissioner changed his ruling and issued an altered award to the parties. On review, the Labour Court held that he was entitled to change his approach before delivering his final award, and that the parties were not entitled to a second hearing to comment on NEDLAC's views. On appeal the LAC upheld that stance, finding that it was not improper for the commissioner to revise his draft award in the light of NEDLAC's comments and that the parties were not entitled to a second hearing to comment thereon. The commissioner had not delegated his decision-making powers to NEDLAC and his award was one that a reasonable decision maker could have made.

*Henred Fruehauf (Pty) Ltd & another v Marcus NO & others* (at 3147) concerned an application to review a demarcation award in which the commissioner had ruled that certain of an employer's activities fell within the scope of the MEIBC, and not of MIBCO. The Labour Court noted that demarcation involves facts, law and policy considerations, and found that due deference should therefore be given to the findings of commissioners in demarcation matters. The commissioner's conclusion was not so unreasonable that no other arbitrator could have come to the same conclusion, and was not open to review.

### **Fixed-term Contracts and the True Employer**

The employee party in *Greyvenstein and Infrasons Holdings Ltd & another* (at 3252) signed fixed-term contracts with two different companies in the same group and, after both contracts expired, remained on in employment. When his employment was subsequently terminated by one company on three months' contractual notice he maintained that he had been unfairly dismissed by that company. The arbitrating commissioner found that he was effectively employed by both companies and that, as the fixed-term contracts had expired and there was no valid reason for the termination, he had been unfairly dismissed. The respondents were held jointly and severally liable for the payment of compensation.

### **Dismissal by Operation of Law**

In *Solidarity on behalf of Joubert and Armaments Corporation of SA (SOC) Ltd* (at 3262) the employment of the applicant was summarily terminated when his security clearance at Armscor was refused by a vetting panel of the SANDF. The arbitrating commissioner rejected Armscor's argument that his employment had terminated by operation of law, and found that the employer had a number of other options open to it and that the dismissal was unfair. The matter came before the CCMA on two occasions. On the second the commissioner ruled that he was not bound by the jurisdictional rulings of the first commissioner.

### **Disciplinary Code and Procedure**

The Labour Court held in *Philander & others v La Maison* (at 3222) that at a disciplinary hearing arising out of unprotected strike action it was not necessary for the employees to present evidence orally in mitigation of sanction. It was quite fair for the chairperson to request written submissions on factors in mitigation, and if they chose not to use that opportunity they had only themselves to blame. In *University of KwaZulu-Natal Staff Union and University of KwaZulu-Natal* (at 3277) the commissioner held that a full-time office-bearer who was not an employee of the university had no automatic right to represent its members at internal disciplinary hearings, and had to apply for such right to the chairperson of the hearing.





### **Joinder**

The Labour Appeal Court has in *Intervalve (Pty) Ltd & another v National Union of Metalworkers of SA on behalf of members* (at 3048) upheld an appeal against an order of the Labour Court joining two other employer entities to unfair dismissal proceedings initiated against a third, although their disputes had not been referred to conciliation. The LAC held that in terms of s 191(5) of the LRA 1995 conciliation is a mandatory requirement, and that in the absence of conciliation the Labour Court lacks jurisdiction to hear the dispute. In *Sambo & others v Steytler Boerdery* (at 3235) the Labour Court followed the LAC decision in *Intervalve* and found that, absent a referral to conciliation the court had no jurisdiction to entertain an unfair dismissal dispute arising from an unprotected strike.

### **Quote of the Month:**

Tlhothalemaje AJ in *Modibedi & others v Medupi Fabrication (Pty) Ltd* (2014) 35 ILJ 3171 (LC), commenting on certain unprotected strike action:

'The employees were quick to be confrontational and embark on any industrial action even in circumstances that did not warrant such action. It is as if the employees, like recalcitrant bullies, were always looking for a street fight.'

