



## INDUSTRIAL LAW JOURNAL PREVIEW

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We take pleasure in presenting the October 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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**Kind regards**

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## HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

### Unfair Discrimination on Account of Age

In *Sali v National Commissioner of the SA Police Service & others* (at 2727) the Constitutional Court by a majority decision refused a SAPS reservist leave to appeal a judgment of the Labour Court which had found that SAPS' refusal to appoint him as a permanent member of the force on account of his age did not constitute unfair discrimination in terms of s 6 of the Employment Equity Act 55 of 1998. The 40-year age limit was contained in a regulation and was, therefore, excluded from the ambit of the EEA's definition of an 'employment policy or practice'. The CC further found that it could not consider the constitutional validity of the regulation as that issue had not been raised before the court below. In a dissenting judgment Jafta J held that leave to appeal should be granted.

In terms of a collective agreement between SA Airways and the Airline Pilots Association pilots over 60 years were paid less than younger pilots. The Labour Appeal Court in *SA Airways (Pty) Ltd v Jansen van Vuuren & another* (at 2774) undertook an indepth enquiry into the provisions of s 6 of the EEA and s 9 of the Constitution, and on appeal endorsed the finding by the Labour Court that the SAA's actions constituted unfair discrimination on account of age in terms of s 6 of the EEA (see (2013) 34 ILJ 1749 (LC)). The fact that the agreement was the product of collective bargaining did not make it fair. The court also found that the SAA had committed an unfair labour practice relating to benefits in terms of s 186(2)(a) of the Labour Relations Act 1995 by utilizing the pilot's accumulated leave pay to pay his salary while he was on standby. Finally, the court considered the distinction between 'damages' and 'compensation' in s 50 of the EEA with reference to judicial authority on the factors to be considered in assessing the amount of such awards.

### Sexual Harassment

A full bench of the High Court in *Sahara Computers (Pty) Ltd v Mokone* (at 2750) confirmed an earlier High Court judgment, which had found that the respondent employee had been subjected to sexual harassment by a more senior employee, and that her employer had negligently breached its duty to provide her with a safe working environment and to protect her against such harassment. The employee was awarded damages for pain and suffering and for future medical expenses to treat psychiatric injury. In *SA Metal Group (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 2848) the CCMA commissioner, arbitrating a somewhat similar case, had found that the sexual attentions of a senior employee towards a junior did not amount to sexual harassment. On review, the Labour Court set aside that award, finding that in arriving at his decision the commissioner had failed to take into account the provisions of the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace 2005. Account of the code was obligatory in terms of s 138(6) of the LRA 1995, and the commissioner's failure to consider it amounted to a gross irregularity. Conversely, in *Simmers v Campbell Scientific Africa (Pty) Ltd & others* (at 2866) the CCMA commissioner had found that a single incident of sexual attention paid by an employee to a consultant to the employer, outside the work environment, constituted sexual harassment and justified dismissal. On review the Labour Court noted that the commissioner had correctly taken the Code of Good Practice into account, but found that the single incident did not amount to harassment or, if it did, did not justify dismissal.

In a complete reversal of the foregoing situations, a female employee in *Lesch-Du Toit and Beatech Technical Solutions CC* (at 2921) was dismissed for 'lewd conduct in the workplace'. At arbitration the evidence established a culture of sexual banter and physical contact in the workplace and that the employee had never been reprimanded for her conduct. Her evidence was preferred to that of the employer's witnesses, and her dismissal was found to be both substantively and procedurally unfair.





### **Rectification of Collective Agreements**

The union parties in *SA Local Government Association v Independent Municipal & Allied Trade Union & others* (at 2811) sought to rectify a collective agreement which they contended did not reflect the true intention of the parties. On appeal the Labour Appeal Court found that the purported agreement had not been finalized, and that it had not in any event been entered into in compliance with the relevant bargaining council constitution. There was therefore no valid agreement capable of rectification.

### **Transfer of Business as a Going Concern**

In *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd & others* (at 2757) the Labour Appeal Court dismissed an appeal from a judgment of the Labour Court (see (2013) 34 ILJ 905 (LC)) and confirmed that the cancellation of service agreements for the operation of an electricity network in Alexandra had triggered the transfer of the employment contracts of the service provider's employees to the appellant prior to the appointment of a new service provider. The LAC considered what constitutes the transfer of a business as a going concern in terms of s 197 of the LRA 1995, and held that it depends on the facts and circumstances, and on whether an identifiable and discrete business undertaking conducted by the first contractor is continued by the new entity. *Unitrans Supply Chain Solutions (Pty) Ltd & another v Nampak Glass (Pty) Ltd & another* (at 2888) similarly involved the cancellation of a service agreement and the appointment of a new contractor. The Labour Court in that case had to determine the true identity of the 'old employer' and did so in a manner that gave effect to substance rather than form. The fact that the affected employees were engaged by a different entity to the one in which the assets and activities that formed the business were housed did not preclude the operation of s 197 and their transfer by operation of law to the new contractor. In *Swanepoel & others v Leica Geosystems AG & others* (at 2877) the court found that on the termination of a non-exclusive agency agreement and the appointment of another non-exclusive agent the provisions of s 197 had not been triggered.

The Labour Court was required in *Palierakis v Atlas Carton & Litho (in liquidation) & others* (at 2839) to consider whether an agreement for the sale of a business as a going concern which provided that the sale was in terms of s 197A of the Act, and that all contracts of employment between employees and the old employer would remain in place, did constitute a scheme of arrangement or compromise, so triggering the provisions of s 197A. The court noted that to trigger the provisions of s 197A(1)(b) the scheme of arrangement or compromise had to comply with the provisions of s 311 of the Companies Act 61 of 1973, and that the sale was simply an ordinary business transaction. Section 197 therefore applied and the employees' contracts had been transferred.

### **Strikes – Protected and Unprotected**

In *Food & Allied Workers Union v In2Food (Pty) Ltd* (at 2767) the Labour Appeal Court allowed an appeal by the appellant union from an order of the Labour Court holding it in contempt of court when its members ignored a court order interdicting violence and intimidation during the course of an unprotected strike (see (2013) 34 ILJ 2589 (LC)). The court nevertheless endorsed the sentiments of the court below that unions should be held accountable for the actions of their members and should not be allowed to wash their hands of members' violent actions. *SA Chemical Workers Union on behalf of Sangweni & others and Reflection Glass (Pty) Ltd* (at 2911) concerned a protected strike in which the strikers had persistently breached agreed picketing rules by blowing vuvuzelas despite their employer's instruction to desist, so disrupting the employer's operations.

At arbitration the CCMA commissioner rejected the employees' evidence that the blowing of vuvuzelas was permitted, and found them guilty of misconduct, but considered the penalty of dismissal to be too harsh.





### **Arbitration Awards – When ‘Issued’**

The Labour Appeal Court in *SA Municipal Workers Union v SA Local Government Bargaining Council & others* (at 2824) had to consider the requirements for a valid arbitration award in terms of s 138(7) of the LRA, and when the award could be said to have been ‘issued’. The court found that, in addition to being in writing, signed and containing brief reasons, an award must have been sent out officially and contain the arbitrator’s final and determinative view on the matter. An email sent by an arbitrator to the parties calling for their comments on the proposed wording of an award were not his final views and the email did not itself amount to an award. The arbitrator was therefore not *functus officio* and could correctly thereafter issue an award with amended wording.

### **Dismissals – Fair and Unfair**

An employee who refused to make a statement or to cooperate in his employer’s investigation into his alleged misconduct was found in *National Union of Metalworkers of SA on behalf of Mathuse and Hillside Aluminium (Pty) Ltd* (at 2930) to have been unfairly dismissed. The arbitrator pointed out that the LRA affords an employee no right to remain silent, and that he has a duty to assist his employer, but found that the sanction of dismissal was too harsh. The dismissal of an employee who was absent from work without notice while undergoing training to become a traditional healer was found in *National Union of Mineworkers on behalf of Mahlaela and Tubatse Chrome (Pty) Ltd* (at 2944) to have been fair. The arbitrator in *Solidarity on behalf of Bakkes and Nampak Divfood* (at 2952) found that an employee who had notified his employer that he was resigning had not proved that he had subsequently withdrawn his resignation, and so had failed to prove that he was dismissed.

### **Practice and Procedure**

The Labour Appeal Court considered the test for establishing contempt of court in *Food & Allied Workers Union v In2Food (Pty) Ltd* (at 2767) and found that it requires proof beyond a reasonable doubt of the order of contempt, of due service of that order and of deliberate wilful disobedience. The text of the order should leave the interdicted party in no doubt what must be done or refrained from. In the case before it the text of the order was vague and the appellant trade union was not itself in breach of the order as a result of its members’ disobedience. Similarly, in *Anglo American Platinum & another v Association of Mineworkers & Construction Union & another* (at 2832) the Labour Court considered the test for establishing contempt, and found that where there was ambiguity in the original court order which had not been complied with, it was not open to the court in contempt proceedings to find that there had been wilful disobedience and bad faith. In *Setshedi v Minister Ndebele & another* (at 2861) the minister and his department failed to comply with a court order requiring him to reinstate the applicant employee. In contempt proceedings the Labour Court recognized the difficulties encountered in ensuring personal service of court orders on government officials and ministers, but found that it could not find the minister guilty of contempt because the order had not been served on him personally.

### **Evidence**

In *Simmers v Campbell Scientific Africa (Pty) Ltd & others* (at 2866) the Labour Court held that it was permissible for a witness testifying in arbitration proceedings to give her evidence via Skype where she had emigrated to Australia prior to the hearing. In *Ramchabi and Bureau Veritas* (at 2900), an arbitration involving an employee’s alleged falsification of travel claims, the CCMA commissioner ruled that the employer could not rely solely on the evidence of a spreadsheet prepared using Google Maps to prove that the employee had overstated the distances he had travelled.

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

Not awarded.

