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We take pleasure in presenting the December 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

Compensation for Occupational Injuries and Diseases Act 130 of 1993

On appeal in MEC for the Department of Health, Free State Province v DN (at 3301) the Supreme Court of Appeal was required to consider whether a nurse who was raped while on duty could sue her employer for damages at common law for failing to provide her with reasonable protective measures against rape. The employer maintained that she was precluded from doing so by the provisions of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, because the incident arose out of her employment, and COIDA provided a strict liability, though less generous, remedy against the employer. The SCA found it inconceivable that the risk of rape should be incidental to the doctor's employment, and that it would be adverse to the employee's interests to restrict her only to a claim for compensation in terms of COIDA. Although she could have sued in terms of COIDA she was still free to sue for damages at common law.

The Vicarious Liability of an Employer in Deviation Cases

The High Court in *Pehlani v Minister of Police* (at 3316) held the respondent minister vicariously liable for the actions of a police reservist who, while in uniform and on duty, attempted to murder her former boyfriend, using a SAPS firearm which had been issued to her. Applying an objective deviation test, the court found that there was a sufficiently close link between the employee's wrongful act and the purposes and business of the SAPS to justify imposing vicarious liability. Although there was no question of the victim placing trust in the reservist, trust in a broader sense could not be discounted. Members of the community know that SAPS members carry firearms and trust them to use them lawfully, and only when necessary, so the reservist had greater freedom of movement.

Powers of the Labour Court

In an application to make an arbitration award an order of court, in *Food & Allied Workers Union & others v Cape Hospitality Services t/a Savoy Hotel* (at 3394) where the employees had delayed for five years in pursuing their claim for reinstatement, the Labour Court found that it had no discretion to limit the extent of the retrospective reinstatement awarded, but only to decide whether or not to make the award an order of court. It found it would not be in the interests of justice to refuse the order.

Fixed-term Contracts of Employment

The Labour Appeal Court has in *Blue IQ Investment Holdings (Pty) Ltd v Southgate* (at 3326) upheld an appeal from an earlier decision of the Labour Court (reported at (2012) 33 ILJ 2681 (LC)) which found that the parties to a fixed-term contract of employment were entitled to vary its terms and to enter into a further agreement during the currency of the contract, and that it was not necessary for them to do so in writing. The LAC found that a non-variation clause in the earlier contract, which required the parties to reduce any variation or cancellation to writing, was binding on the parties and rendered any further contracts invalid unless those requirements were met. The employees' fixed-term contracts of employment in *Hudson & another v SAA Airways SOC Ltd* (at 3407) were found to have been concluded in contravention of the SA Airways Act 5 of 2007 read with the Public Finance Management Act 1 of 1999, and therefore also to be invalid. The court found the employees to be precluded from pleading estoppel as it would not be in the public interest to enforce contracts which contravened legislative provisions. In *National Security Commercial & General Workers Union on behalf of Nteso and Phillip Saunders Resort* (at 3501) an employee who continued to work beyond the expiry of his fixed-term contract of employment was found to have an expectation of permanent employment and to have discharged the onus of proving that he had been unfairly dismissed. Similarly, in *Naicker and Audio Secure* (at 3513) the arbitrator found that an employee who had signed successive fixed-term contracts and had continued working after their expiry was employed on a permanent basis, and that his employment was not subject to a tacit agreement that his employment would end on the expiry of a further term.





Other Contracts of Employment

In *Kaltwasser v Isambulela Group Administrator (Pty) Ltd* (at 3436) the employee would not sign the employer's standard contract and was told to draft his own. When, two years later, he presented his manager with a contract which appeared to be the standard contract, the manager signed it unread. The contract in fact contained certain new terms, and the employee later lodged a contractual claim before the Labour Court for the employer's breach of those terms. The court found that the employee was not entitled to rely on the doctrine of caveat subscriptor as he failed to alert the employer to the changes he had made, and the employer succeeded in its defence based on justus error. The court found in *Motitswe v City of Tshwane* (at 3458) that the applicant's contract of employment, on which he based his claim against the respondent municipality for unfair dismissal, was subject to a suspensive condition which had not been fulfilled. The contract had accordingly lapsed and the applicant was no longer an employee. In *Grup v Renaissance BJM Securities (Pty) Ltd* (at 3400) the court found that a undertaking by the employer to compensate the employee for the deferred equity compensation he would forfeit on resignation from his previous employer vested on the signing of his employment contract. The employee's claim to the compensation in terms of the undertaking therefore survived the termination of the employment contract.

Disciplinary Penalty

The Labour Appeal Court found in *Department of Home Affairs & another v Ndlovu & others* (at 3340) that a misrepresentation in an employee's CV, claiming a qualification which he did not possess, amounted to gross dishonesty justifying the sanction of dismissal. Similarly, in *Rainbow Farms (Pty) Ltd v Dorasamy NO & others* (at 3462) the Labour Court held the dismissal of an employee who had misrepresented her qualifications in her CV to be justified, and that it was no defence to an allegation of fraud that the employer could have verified her allegations by referring to her personnel file.

In *Solari v Nedbank Ltd & others* (at 3349) the LAC found the dismissal of a bank employee who deliberately used improper bank procedures to gain a financial advantage for himself was justified because he had used deceit in doing so, and had exposed the bank to additional financial risk. In *Hulamin Ltd v Metal & Engineering Industries Bargaining Council & others* (at 3417) the Labour Court found the dismissal of an employee for 'time fraud' after leaving her place of employment in order to buy food, to be unfair. She had pleaded guilty in disciplinary proceedings to leaving her place of employment, but had not been found guilty of any offence of fraud or dishonesty.

Constructive Dismissal

In *Western Cape Education Department v General Public Service Sectoral Bargaining Council & others* (at 3360) the Labour Appeal Court dismissed an appeal from an earlier decision of the Labour Court (reported at (2013) 34 ILJ 2960 (LC)) and confirmed that the treatment of an employee whose requests for incapacity leave or ill-health retirement had been ignored, and where excessive deductions had been made from his salary, and who had thereafter resigned, amounted to his constructive dismissal. Unusually, the LAC also endorsed the employee's request for reinstatement. The court held that in such circumstances, the employee must show that the intolerable conditions that prevailed at the time of the termination were no longer extant, and that he had done so. The commissioners in both *Baddley and B Lion Investment (Home of the Chicken Pie)* (at 3486) and *Madzie and University of Venda* (at 3496) considered the requirements that an employee had to meet in terms of s 186(1)(e) of the LRA 1995 in order to prove that she had been constructively dismissed, and found that, on an overall conspectus of the facts, the employer had not created an intolerable working environment and that resignation was not the employee's last resort.

Other Dismissals





The arbitrator in *Kubheka and Mortimer Toyota Harrismith* (at 3507) held that an employee whose employment was terminated when he reached the age of 65 years had not been automatically unfairly dismissed because his employer had shown, in terms of s 187(2)(b) of the LRA 1995, that he had reached the age prescribed in the industry's provident fund agreement. A traffic officer employed by the respondent municipality, in *SA Municipal Workers Union on behalf of Nkomo and City of Cape Town* (at 3519), was dismissed for insubordination when she refused to obey an instruction by her superiors to return the key of a car to an unlicensed driver. The arbitrator found the instruction to be unreasonable and unlawful, and that she was entitled to refuse it.

Registration of Bargaining Councils

The Labour Court considered the matters to be considered by the Registrar of Labour Relations when called upon in terms of s 58(1) of the LRA 1995 to vary the scope of registration of a bargaining council in *Servworx (Pty) Ltd v Registrar of Labour Relations & another* (at 3476). The registrar may vary the registered scope if satisfied that the sector and area within which the council is representative does not coincide with that of another registered council, and is not required to satisfy himself that the council is sufficiently representative.

Practice and Procedure

In *City of Johannesburg v SA Municipal Workers Union on behalf of Motaung & others* (at 3374), an arbitration award ordering the payment of an employee's salary had been certified in terms of s 143(3) of the LRA 1995, and a writ of execution had been issued. The Labour Court refused to order a stay of execution at the employer's request. The court considered the established principles for ordering a stay of execution and found that the employer would not suffer irreparable harm if the stay were refused. Any monies paid could later be deducted from the employee's salary should the employer mount a successful review. The Labour Court set aside a number of subpoenas duces tecum issued in *Discovery Health Ltd & others v Jacobs* (at 3385), finding that they had been called not to facilitate the pursuit of the truth, but to intimidate, harass and embarrass the other party's witnesses.

Quote of the Month:

Navsa ADP in *MEC for the Department of Health, Free State Province v DN* (2014) 35 ILJ 3301 (SCA):

'Dealing with a vulnerable class within our society and contemplating that rape is a scourge of South African society, I have difficulty contemplating that employees would be assisted if their common-law rights were to be restricted as proposed on behalf of the MEC. If anything, it might rightly be said to be adverse to the interest of employees injured by rape to restrict them to COIDA. It would be sending an unacceptable message to employees, especially women, namely, that you are precluded from suing your employer for what you assert is a failure to provide reasonable protective measures against rape because rape directed against women is a risk inherent in employment in South Africa. This cannot be what our Constitution will countenance.'

