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We take pleasure in presenting the January 2015 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

Juta General Law





HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Bargaining Councils

In *Confederation of Associations in the Private Employment Sector & others v Motor Industry Bargaining Council & others* (at 137) the Gauteng High Court examined the powers and functions of bargaining councils and concluded that the provisions of s 32 of the LRA 1995, which provide for the extension of bargaining council agreements to non-parties, comply with the ordinary requirements of legal accountability and constitutional control and are not unconstitutional.

In *Plastics Convertors Association of SA on behalf of Members v National Union of Metalworkers of SA & others* (at 256) the Labour Court found that, where an employers' organisation applies for admission as a party to a bargaining council and the council fails to take a decision whether to admit or refuse membership within 90 days, the deeming provision in s 56(3) of the LRA comes into effect and the application for admission is deemed to have been refused. The court also found that, although the objective of the MEIBC had been to establish an exclusive forum for collective bargaining in the plastics sector within the bargaining council, this objective had not been achieved. The parties were therefore bound by the main agreement, and any strike by employees employed by members in the plastics sector was protected.

Regulation of Gatherings Act 205 of 1993

The Labour Court refused to grant the employer an interdict in *ADT Security (Pty) Ltd v National Security & Unqualified Workers Union & others* (2012) 33 ILJ 575 (LC) to prevent the union from organising a march to its premises where the union had already obtained permission for the march from the local authority in terms of the Regulation of Gatherings Act 205 of 1993. The court found that the gathering was clearly lawful, and that the employees were not seeking to exercise their rights in terms of the LRA 1995, but were relying on their constitutional right to assemble, demonstrate, picket and petition, as regulated by the Gatherings Act. However, on appeal the Labour Appeal Court found that a party could not circumvent the provisions of the LRA, and, as the dispute concerned organisational rights, it should have been dealt with in accordance with the procedures afforded by the LRA, which contained carefully crafted rules to deal with the resolution of disputes and the protection of rights within the area of labour relations (*ADT Security (Pty) Ltd v National Security & Unqualified Workers Union & others* at 152).

Labour Court Jurisdiction

In *Hendricks v Overstrand Municipality & another* (at 163) the Labour Appeal Court found, after an extensive survey of the authorities, that the Labour Court has jurisdiction to adjudicate disputes involving public service employees, including the jurisdiction to review the decision of a chairperson of a disciplinary enquiry, in terms of s 158(1)(h) of the LRA 1995. Judicial review is permitted on the grounds listed in the Promotion of Administrative Justice Act 3 of 2000 provided the decision constitutes administrative action; in terms of the common law in relation to domestic or contractual disciplinary proceedings; or in accordance with the requirements of the constitutional principle of legality, as these are all grounds 'permissible in law' in terms of s 158(1)(h) of the LRA.

Deregistration of Employers' Organisations

In *Registrar of Labour Relations v Consolidated Association of Employers of SA Region* (at 182) the Labour Appeal Court upheld the Registrar of Labour Relations' decision to cancel the registration of the respondent organisation, CAESAR. It found that the registrar had acted on documents and evidence supplied by CAESAR, had allowed CAESAR to make representations and had relied on the guidelines published in terms of s 95(8) of the LRA 1995 before correctly concluding that CAESAR was part of a labour consultancy business disguised as a registered employers' organisation and was operating as an organisation for gain.





Transfer of Business as Going Concern

The Labour Appeal Court found that, where a warehousing agreement was cancelled and a new contractor was appointed to render the same services without interruption from the same premises using the same infrastructure as the old contractor, this constituted the transfer of a business as a going concern and triggered the application of the provisions of s 197 of the LRA 1995 (*TMS Group Industrial Services (Pty) Ltd t/a Vericon v Unitrans Supply Chain Solutions (Pty) Ltd & others* at 197).

Retrenchment

In *Rogers v Exactocraft (Pty) Ltd* (at 277) the employee had retired on reaching retirement age and had immediately thereafter entered into a fixed-term contract with the employer. He was later retrenched in terms of the contract, and claimed, inter alia, severance pay for his entire period of employment, relying on ss 41 and 84 of the Basic Conditions of Employment Act 75 of 1997. The Labour Court adopted a purposive interpretation of s 84 and, having considered international instruments and national judicial and academic authorities, was satisfied that the legislature could not have contemplated that an employee who has received his retirement benefits upon retirement should also benefit in the form of severance pay arising from his later dismissal for operational requirements in terms of a subsequent and separate fixed-term contract. The employee's employment before retirement could, therefore, not be considered for purposes of calculating severance pay.

Residual Unfair Labour Practices — CCMA Jurisdiction

An employee had been placed on indefinite short time. In proceedings before the CCMA, the commissioner ruled that the employee's description of the dispute as an 'unfair dismissal' was not binding as the commissioner had a duty to determine the true nature of the dispute. He found that the employee was not on short time as a temporary measure, and was not suspended nor dismissed, but that he had effectively been prevented from tendering services by the employer. The dispute thus related to an entitlement to pay, and such pay constituted a benefit in terms of the extended definition thereof. The dispute thus fell within the ambit of an unfair labour practice in terms of s 186(2)(a) of the LRA 1995 and the CCMA had jurisdiction to arbitrate (*Galane and Green Stone Civils CC* at 303).

Where an employee sought to be placed on the same salary notch as external candidates appointed at the same level, the CCMA ruled that it had no jurisdiction to arbitrate the dispute. The dispute was not rooted in contract or legislation nor was it a benefit granted in terms of a policy or practice subject to the employer's discretion. In the circumstances the employee could not claim that the employer's conduct constituted an unfair labour practice relating to benefits in terms of s 186(2)(a) of the LRA (*Mbiza and National Youth Development Agency* at 326).

Dismissal for Operational Requirements

The Labour Court confirmed that compliance with the provisions of s 189A of the LRA 1995, where it applies to an employer employing more than 50 employees, is peremptory. When such an employer chooses not to make use of a facilitator, s 189A(8) applies, and the periods referred to in s 64(1)(a) are activated by a referral to the CCMA or a bargaining council. The employer in this matter failed to trigger the periods in s 64(1)(a) by a referral to the CCMA, and consequently the periods set out in s 189A(8) read with s 64(1)(a) had not lapsed. The termination notices issued by the company were therefore premature and of no force and effect (*Food & Allied Workers Union v Cold Chain (Pty) Ltd* at 226).

Disciplinary Penalty

A mail handler was dismissed by the SA Post Office after he was found to have deliberately delayed in delivering mail. At CCMA arbitration the commissioner noted that the employer's disciplinary code provided that the seriousness of the transgression was to be determined by the period of the delay. In this matter, the delay of seven days in delivering the mail was not lengthy — and was considerably less than the delay caused by the postal strike. He found that, taking the length of delay as well as the





employee's 29 years of service and clean disciplinary record into account, the employer ought to have imposed the lesser sanction of a final written warning (*Dire and SA Post Office Ltd* at 292). In *Janse van Vuuren and SA Post Office* (at 313) the dismissal of a post office manager for financial misconduct was found to be fair as it was clear that the trust relationship had broken down.

Arbitration Awards — Review

A bargaining council arbitrator handed down an award in which he made adverse credibility findings against the applicant employer. He subsequently presided over a second arbitration after his earlier award was rescinded. He refused to recuse himself, refused to hear the applicant's representative, refused to record the proceedings mechanically and failed to disclose his close personal relationship with the respondents' representative. On review, the Labour Court found that the arbitrator's conduct was grossly irregular and set aside the award (*Bezuidenhout t/a D B Bezuidenhout v Pretorius & others* at 211).

Practice and Procedure

In two matters the Labour Court considered the principles relating to the peremption of the right to review an arbitration award. In *Ellerines Furnishers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 215) the employer had unconditionally complied with an arbitration award before it was varied by the commissioner. The employer then sought to review the entire award. The court found that the employer could not, at the time of payment of the original award, be said to have unconditionally waived its right to review the variation award, and, once the variation award was issued, the employer was entitled to challenge the entire award. Its right to review the original and variation award was not perempted. However, in *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) & others* (at 232) the court was satisfied that the union and the employee had accepted, without challenge or reservation, an award reinstating and awarding limited backpay to the employee. Only months later, after the employer had fully complied with the award, did the union and employee challenge the portion of the award relating to backpay. The court found that they were in the circumstances precluded from reviewing the award.

Evidence

In *Kroats and SA Reserve Bank* (at 320) the CCMA commissioner had to determine how to proceed with the matter where it was clear from the expert evidence that the applicant employee was suffering from a delusional disorder and would not be competent to testify. The commissioner determined that it would not be appropriate to postpone the matter indefinitely as there was no guarantee that the employee would ever recover and no guarantee that the respondent's witnesses would be available even if she did. He found that it was not in the interest of fairness or justice to delay the matter and that a postponement would cause unreasonable prejudice to the employer.

In *Independent Municipal & Allied Trade Union on behalf of Ngcobo & others and eThekweni Municipality* (at 330) the bargaining council arbitrator surveyed the law relating to the discovery of documentary evidence. Having determined what a 'document' includes, the arbitrator found that it did not include a document found on the Internet. The mere fact that a document was on the Internet and appeared to have been issued by the respondent employer was not sufficient, and the applicant union had to provide a full copy of the document and to call a witness to prove the veracity of the document before it could be admitted.

Quote of the Month:

Not awarded.

