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We take pleasure in presenting the April 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.

Please note: This newsletter serves as a preview of the printed and the electronic *Industrial Law Journal*. At the time of this dissemination, the full-length cases and determinations are still being prepared for publication in the *Industrial Law Journal*. The material mentioned in this newsletter only becomes available to subscribers when the *Industrial Law Journal* is published.

Please forward any comments and suggestions regarding the *Industrial Law Journal* preview to the publisher, Michelle Govender, mgovender@juta.co.za.

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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

The Restraint of Trade Agreements

In *Bonfiglioli SA (Pty) Ltd v Panaino* (at 947) the Labour Appeal Court, in interpreting a clause relating to a restraint of trade and retention bonus entered into by the employer and employee, found that there was a distinction between a restraint and a retention bonus — the restraint of trade prevented the employee from competing with the employer after termination of employment, whereas the retention bonus rewarded the employee for staying in employment. It found, therefore, that the parties could never have intended the employer to benefit from the protection of the restraint clause during the currency of the agreement, as the need for protection only arose on termination of employment.

In *FMW Admin Services CC v Stander & others* (at 1051) the Labour Court declined to grant an interdict to enforce a restraint of trade agreement where this would be contrary to public policy. In the court's view the interest that the employer, a labour consultancy and payroll service provider, sought to protect was not a business model that specialised in independent contractor agreements but was an exploitative arrangement and sham designed to avoid compliance with the law. It was therefore not worthy of protection and it was not in the public interest to enforce the restraint. However, in *SPP Pumps (SA) (Pty) Ltd v Stoop & another* (at 1134) the Labour Court granted the employer an interdict restraining a former employee from conducting business in direct competition with it in breach of a restraint of trade agreement. The court rejected the employee's defence that the confidential information was in the public domain on the Internet as legally untenable — the information constituted a protectable interest because it had been obtained by the employee within the context of a confidential relationship.

Sexual Harassment

In two matters the Labour Court had to determine whether the employer was liable for sexual harassment of one employee by a fellow employee in terms of s 60 of the Employment Equity Act 55 of 1998. In *Moatshe v Legend Golf & Safari Resort Operations (Pty) Ltd* (at 1111), where the complainant had been raped by her supervisor, the court was satisfied that the employer had done everything required of it by s 60: it had acted immediately; consulted with the complainant; accommodated her where she would not come into contact with her supervisor; and had taken steps to ensure that his services were terminated. In *Future of SA Workers Union on behalf of AB & others v Fedics (Pty) Ltd & another* (at 1078), where a manager's abusive and demeaning remarks to female employees were found to constitute verbal sexual harassment, the court was of the view that the employer had taken the reasonable step of separating the manager from the complainants, but had failed to appreciate the seriousness of the complaints against the manager, and had therefore held an informal meeting and issued a warning to the manager instead of holding a formal investigation before taking disciplinary steps. The employer was therefore liable in terms of s 60, and the court awarded the complainants six weeks' wages.

The Labour Court granted absolution from the instance in *Bandat v De Kock & another* (at 979), having found that the employee had failed to make out a prima facie case of constructive dismissal or sexual harassment. It was apparent on the employee's own version that she resigned after receiving a warning about poor work performance, and had only thereafter sought to rely on earlier sexual conduct of her employer, which at the time she did not find inappropriate, to claim that her working environment was intolerable.

Unfair Discrimination — Conscience, Belief or Public Opinion

In *Brink v Legal Aid SA* (at 1020) the applicant contended that the respondent had relied on financial constraints as a pretext not to appoint him, an unpopular and reviled AIDS dissident, and that this

constituted prohibited discrimination. The Labour Court noted that, where an employee alleges discriminatory or impermissible motives, the inference that the employer lied can give rise to the inference that it lied for a particular purpose, such as to cover up a discriminatory purpose. However, in this case the applicant failed to prove any discriminatory conduct by the employer in its failure to appoint him, and his claim was dismissed with costs.

Employee — More than One Employer

The Labour Court found, in proceedings to interdict a suspension and pending disciplinary hearing, where the employee — the executive chairman of one respondent, the chief executive officer of two further respondents and a director of a further respondent — claimed that he was not employed by the entity that suspended him, that the courts have previously held that highly placed employees who perform services on behalf of a number of associated entities usually have more than one employer (*Golding v HCI Managerial Services (Pty) Ltd & others* at 1098).

Labour Court — Jurisdiction

In *O Thorpe Construction & others v Minister of Labour & others* (at 935) the High Court confirmed that the Labour Court has exclusive jurisdiction to review a decision of the Minister of Labour to extend a bargaining council agreement to non-parties in terms of s 32(2) of the LRA 1995.

Bargaining Council — Jurisdiction

In *CTP Ltd t/a Caxton Newspapers Division v Mphaphuli NO & others* (at 1042) the Labour Court confirmed that a bargaining council arbitrator has jurisdiction to interpret a settlement agreement in order to determine whether the dispute before it has been settled by the agreement. Neither s 24(5) nor any other section of the LRA 1995 excludes such jurisdiction.

Constructive Dismissal

An employee who had justifiably refused to comply with an instruction which amounted to a unilateral variation of her contract of employment was found not guilty of gross insubordination. She resigned when she was called to face a second disciplinary hearing on the same charge. The Labour Court found that she had been constructively dismissed. The Labour Appeal Court upheld this finding, noting that there had been a pattern of harassment of the employee by the employer, which was culpably responsible for the intolerable conditions that had arisen at the workplace (*Metropolitan Health Risk Management v Majatladi & others* at 958).

Test for Review of Awards of Commissioners

In *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (at 968) the Labour Appeal Court found that, on review of a CCMA commissioner's award the Labour Court, having confirmed that the employee had committed the misconduct, enquired whether the commissioner had imposed an appropriate sanction. It, therefore, focused on the correctness, rather than the reasonableness, of the commissioner's decision. In doing so the Labour Court adopted the piecemeal approach rejected by the LAC in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 *ILJ* 943 (LAC). This had the effect of turning the review into an appeal.

Contract of Employment — Professional Footballer

The football player in *Norodien and Ajax Cape Town Football Club* (at 1144) joined the club as a minor after his mother had signed a special power of attorney in favour of the club's chief executive officer. On reaching 18 years the player signed an apprentice contract and the CEO, relying on the power of

attorney, signed a professional employment contract and registered the player with the NSL. The Dispute Resolution Chamber found that a contract of personal service could not be signed by the CEO both as employer and on behalf of the employee, and it was void. Furthermore, it was morally and practically reprehensible and against public policy to rely on an irrevocable power of attorney to permit unrestrained authority to act on behalf of a minor in perpetuity. However, the chamber found that the player was bound by the apprentice contract, and his employment by the club continued under this contract.

Quote of the Month:

The Dispute Resolution Chamber in *Norodien and Ajax Cape Town Football Club* (2015) 36 *ILJ* 1144 (ARB), commenting on a contract of employment signed by the chief executive officer of a football club as employer and, relying on a power of attorney, as employee:

> 'To hold that a person, other than the employee, can finalise a contract of employment with the employer is a bewildering thought. But to determine that the employer can, in terms of a power of attorney, agree to a contract as an employer with himself as the employee tears the bounds of credibility let alone moral subtleties. … This contract violently annihilates the fundamental principle requiring an understanding between two parties in order to conclude a contract. And this lamentable conduct is compounded by the fact that the chief executive officer of the club determines all the material terms of the contract and signs the employment contract both as the employer and the employee. ... By no stretch of reason, common sense or logic can this document be characterised as a contract of employment.'