INDUSTRIAL LAW JOURNAL PREVIEW

VOLUME 36

MARCH 2015

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

Insolvency Act 24 of 1936 — Meaning of 'Employee'

The Constitutional Court has found that s 9(4A) of the Insolvency Act 24 of 1936, which requires that a copy of a petition for sequestration must be furnished to employees of the insolvent debtor before the order for provisional sequestration may be granted, also applies to domestic employees of the debtor. The court found further that furnishing the petition to employees is compulsory, and that the petition must be made available in a manner reasonably likely to make it accessible to the employees. The court limited the retrospective effect of its interpretation of 'employees', noting that many creditors would have acted on the authority of an earlier Supreme Court of Appeal decision which found that s 9(4A) only required notice to be provided to business employees and not domestic employees (*Stratford & others v Investec Bank Ltd & others* at 583).

Prescription Act 68 of 1969

In *Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Le Fleur v Rotolabel—A Division of Bidpaper Plus (Pty) Ltd* (at 700) the Labour Court considered the four different approaches that have been adopted by the Labour Court to the prescription of arbitration awards. It found that the correct approach is that the Prescription Act 68 of 1969 is applicable to all arbitration awards, whether they are for reinstatement, re-employment or compensation, and the prescription period is three years.

Retrenchment

The applicant employee approached the Labour Court for an interdict to stay his retrenchment pending resolution of a disclosure of information dispute referred to the CCMA in terms of s 16 read with s 189(4) of the LRA 1995. The court found that, in addition to his right not to be unfairly dismissed, the employee had a clear right in terms of s 189(3) to be provided with relevant information, and this included financial information especially where the employer gave financial concerns as its reason for retrenchment. The court found further that s 16 did not only apply to trade unions — it had to be read in the context of a consultation process in terms of s 189. As the employee met all the other requirements, the court granted an interdict restraining the employer from continuing with the retrenchment pending the outcome of the disclosure dispute referred to the CCMA (*De Klerk v Project Freight Group CC* at 716).

Labour Court — Jurisdiction

Where the appellant municipality made deductions from full-time shop stewards' salaries for the duration of a protected strike, the Labour Court found that the shop stewards had not participated in the strike and were entitled to their remuneration during the strike. On appeal, the majority of the Labour Appeal Court found that the payment of full-time shop stewards was regulated by a collective agreement. Any dispute relating to deductions from their salaries had, therefore, to be resolved by conciliation and, failing that, arbitration by the relevant bargaining council. The Labour Court accordingly had no jurisdiction to entertain the dispute (*Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union on behalf of Members* at 624).

The Labour Court found, in *Motor Industry Bargaining Council v Suliman & others* (at 727) that it did not have jurisdiction to impose a civil penalty on members of a close corporation in terms of s 26(5) of the Close Corporations Act 69 of 1984.

Settlement Agreements

The applicant employee and respondent company had entered into a settlement agreement in terms of which the employee would be re-employed on the same terms and conditions and to the same position

as he occupied before his resignation. However, when the employee reported for duty the employer showed no intention to comply with the settlement agreement. A CCMA commissioner found that the employee had been dismissed and awarded him compensation equivalent to seven months' salary despite the fact that he had only been re-employed for two days. The Labour Court found on review that the employee had not been dismissed. On appeal, the Labour Appeal Court agreed with the commissioner's finding that the employee had been dismissed. The employer contended that, as it had made several offers to re-employ the employee which he refused, he was not entitled to compensation. The LAC disagreed — it was clear that the offers were not genuine, reasonable or unconditional offers to re-employ him in terms of the settlement agreement. He was, therefore, entitled to compensation and the court declined to interfere with the quantum of compensation awarded (*Kukard v GKD Delkor (Pty) Ltd* at 640).

In *Chidi & others v University of* SA (at 709) the applicant employees applied to have a settlement agreement set aside on the basis that their representative did not have a mandate to sign the agreement on their behalf. The Labour Court found that the employer reasonably believed that the representative had the authority to sign the agreement based on the conduct of the employees during the conciliation proceedings and subsequent negotiating process. The employees were therefore estopped from denying his authority, and the agreement was valid and binding.

Breach of Contract

The applicant concluded a fixed-term contract for 22 months as coach for the respondent football club, but his services were summarily terminated after two months. In proceedings for breach of contract before the Dispute Resolution Chamber of the National Soccer League the chairman found that the club's failure to call a material witness to refute the coach's evidence entitled him to draw an adverse inference that such witness's testimony would not have advanced the club's case. In the circumstances, the chairman found that the coach had a valid contract and that the contract was breached by the club. In determining the quantum of damages to be awarded, the chairman noted that it was important to consider the peculiar nature of the football industry and to balance the need for the survival of the league against the prejudice suffered by the coach. Relying on these considerations, he found that damages equivalent to eight months' salary would be fair and equitable (*Tlale and Roses United Football Club* at 813).

Disciplinary Penalties

In *Absa Bank Ltd v Naidu & others* (at 602) the Labour Appeal Court noted that the parity principle is not to be applied willy-nilly without any measure of caution. It found that, although the element of consistency on the part of an employer in its treatment of employees is important, the fact that an employee committed a transgression in the past and was not dismissed is not a licence to every other employee to commit a similar offence in the belief that he or she will not be dismissed. In *Singh v eThekwini Municipality (Treasury Department) & others* (at 769), the Labour Court found that an employer should not be held to be acting inconsistently in the application of disciplinary measures where employees flout its disciplinary rules unless there is evidence that the employer was aware of the infractions and nevertheless chose not to take disciplinary action.

A CCMA commissioner found that the applicant employee had been accountable for furnishing incorrect information to a committee of the Health Professions Council of SA, which led to the committee erroneously registering a doctor as a specialist neurosurgeon. The employee was therefore guilty of the charge against him, but the commissioner found that the penalty of dismissal was too harsh. Although the employee was guilty of an administrative oversight, it was the committee that carried ultimate responsibility for its own incompetence and its failure to exercise due diligence before registering the doctor as a neurosurgeon. The employee appeared to have been a scapegoat, selected for sacrifice by

the employer because of excessive negative media coverage. The commissioner awarded the employee 11 months' compensation for his unfair dismissal (*Kotzé and Health Professions Council of SA* at 787).

Conduct of Legal Representatives

The Labour Court found, in *Candy & others v Coca Cola Fortune (Pty) Ltd* (at 677), that the advocate representing the applicant employees in proceedings before it was practising for his own account without a brief from attorneys. He attempted to mislead the court and the respondent party and his conduct was dishonest and unprofessional. The advocate was ordered to pay costs de bonis propriis.

Conduct of Bargaining Council Arbitrators

In *Sasol Infrachem v Sefafe & others* (at 655) the Labour Appeal Court considered the authorities on the duty of disclosure and recusal by judicial officers, which also applied to bargaining council arbitrators. In this matter the arbitrator had failed to disclose her shareholding in and family relationship with the owner of a company which did business with the appellant company at the outset of the arbitration proceedings. Relying on the established principles, the court was satisfied that the arbitrator should have disclosed the facts linking her to the company, and her failure to do so vitiated the entire arbitration proceedings.

Collective Agreements and Lock-outs

In *National Employers' Association of SA v Metal & Engineering Industries Bargaining Council & others* (at 732) the Labour Court found that s 206 of the LRA 1995 in effect provides that even if a bargaining council or its committees were not constituted in accordance with the council's constitution when it requested the minister to extend a collective agreement in terms of s 32(1), that defect does not invalidate the request nor does it affect the validity of the collective agreement.

In *National Union of Metalworkers of SA on behalf of Members v National Employers' Association of SA & others* (1) (at 743) the Labour Court found that it was clear from the wording of s 31*(a)* that there is an additional prerequisite that must be met for a collective agreement concluded at a bargaining council to bind a party to that council — the party must also be a signatory to that agreement itself. As the respondent employers' organisation, NEASA, had not signed the relevant collective agreement, neither it nor its members were bound by the agreement until it was extended to non-parties by the minister in terms of s 32. The court, accordingly, found that the applicant union, NUMSA, could not insist that NEASA and its members were not entitled to pursue a protected lock-out of NUMSA members. However, some months later the Labour Court found that the continuation of that same lock-out by members of NEASA had become unlawful and unprotected once NUMSA unconditionally acceded to NEASA's demands as set out in its lock-out notice (*National Union of Metalworkers of SA on behalf of Members v National Employers' Association of SA & others* (2) at 753).

SA Police Service — Dismissal by Operation of Law

A member of the SA Police Service who was dismissed and suspended pending an appeal, purchased his discharge from the service in terms of regulation 15(1)*(e)* of the SAPS Regulations. However, regulation 15(5) provides that a member who is on suspension when he purchases his discharge is deemed to be discharged for misconduct, and the SAPS therefore insisted that the member had been dismissed. The Labour Court considered the meaning of regulation 15 and found that the literal meaning of regulation 15(5) was clear, namely, where a member purchases his discharge before the disciplinary process is finalised, he is deemed to be discharged on account of misconduct. Even following a purposive approach, the court found that the purpose of regulation 15(5) is obvious, namely, it is to prevent a situation where a member of the SAPS who is dismissed for misconduct, by snatching at the bargaining of purchasing his discharge, gets off scot free by claiming that he has resigned (*Police & Prisons Civil Rights Union on behalf of Kgope v Minister for Safety & Security & another* at 760).

Residual Unfair Labour Practice

A bargaining council arbitrator found that, where the respondent department had exercised its discretion not to grant the applicant employee a performance bonus, it did not do so capriciously, arbitrarily or for no justifiable reason. The department had therefore not committed an unfair labour practice relating to benefits as contemplated in s 186(2)(a) of the LRA 1995 (Public Servants Association on behalf of Motsekoa and Department of Sports, Arts & Culture at 808).

Practice and Procedure

In *Singh v eThekwini Municipality (Treasury Department) & others* (at 769) the Labour Court considered the principles relating to the peremption of the right to review an arbitration award. It found that where the respondent employer paid the full amount in terms of an arbitration award to the employee after he had served his review application on the employer, the employee had clearly demonstrated that he was exercising his right to review the award and had not waived this right.

In *Candy & others v Coca Cola Fortune (Pty) Ltd* (at 677) the Labour Court upheld the respondent's exception to the applicants' statement of claim where the statement did not comply with rule 6 of the Labour Court Rules. It did not identify the applicants properly or at all; it set out multiple and contradictory causes of action; and it sought remedies which were incomprehensible. The statement failed to serve the purpose of informing the respondent of the case it had to meet and identifying the issues to the court, and was clearly excipiable.

In *Khampepe v Department of Health (Free State) & others* (at 722) the Labour Court confirmed that heads of argument prepared by the parties are not regarded as evidence. It found that, where a bargaining council arbitrator made a jurisdictional ruling relying solely on heads of argument provided by the parties, he failed to act in accordance with the powers conferred upon him by s 142 of the LRA 1995. The arbitrator had a duty to hear viva voce evidence to determine the jurisdictional issue, especially where the employee was a lay litigant and submitted that he had positive evidence to prove his version. This failure constituted a gross irregularity, and the award was reviewed and set aside.

Quote of the Month:

Jansen van Vuuren C in *Kotzé and Health Professions Council of SA* (2015) 36 *ILJ* 787 (CCMA), commenting on the disciplining of the employee, an administrative manager, for the incompetence of a committee of the HPCSA:

> '[The HPCSA] … aligned itself with the despicable modern-day tendency to leave unscathed the real culprits, the high and mighty who forsake their duty towards the citizens of their countries and rather to select and sacrifice suitable underlings on the altar of expediency.'