# INDUSTRIAL LAW JOURNAL PREVIEW

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We take pleasure in presenting the May 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

**Appeal to Constitutional Court**

The Constitutional Court granted the employer leave to appeal against a default judgment by the Labour Court in which it found that the employer had violated a fundamental right by dismissing its employees for union membership and had awarded them 24 months' compensation. The court noted that, despite the fact that the order had been erroneously granted, the employer had been unsuccessful in having the order rescinded in both the Labour Court and the Labour Appeal Court, and had no other court to turn to for reversal of the negative finding that it was anti-union and had violated its employees' most fundamental right. The court was satisfied that it was, in these circumstances, in the interests of justice to grant leave to appeal (*F & J Electrical CC v Metal & Electrical Workers Union on behalf of Mashatola & others* at 1189).

**CCMA — Assumption of Jurisdiction**

The Labour Appeal Court has, in two matters, dealt with the correct procedure to be followed when a dispute is erroneously referred to the CCMA instead of the relevant bargaining council. It found that, on a proper interpretation of s 147(2) and (3) of the LRA 1995, the CCMA, and not a commissioner, has the power to determine whether to assume jurisdiction to resolve such a dispute or to redirect it to the proper forum once it becomes apparent that the parties to the dispute are parties to a bargaining council or that the parties fall within the registered scope of a bargaining council. Once the CCMA has elected to refer the matter to the bargaining council, it ceases to have jurisdiction and the dispute before it lapses (*National Education Health & Allied Workers Union on behalf of Kgekwane v Department of Development Planning & Local Government, Gauteng* at 1247 and *Qibe v Joy Global Africa (Pty) Ltd: In re Joy Global Africa (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* at 1283).

**Trade Union — Representation of Member**

In *Kalahari Country Club v National Union of Mineworkers & another* (at 1210) the Labour Appeal Court confirmed that the employee was entitled to be represented at arbitration by the trade union of which he was a member even if the employee was employed in a sector not covered by the union's constitution.

**Strike — Issue in Dispute**

In *National Union of Mineworkers v Wanli Stone Belfast (Pty) Ltd* (at 1261) the Labour Appeal Court found that, although the dispute between the trade union and the employer had its genesis in a wage demand, the real issue in dispute was a refusal by the employer to negotiate with the union over wages and conditions of service. As the union had failed to obtain an advisory arbitration award before embarking on strike action, the strike was unprotected and the dismissal of employees for participation in the strike was fair.

**Strike — Organisational Rights**

The Labour Court found, in *Bidvest Food Services (Pty) Ltd v National Union of Metalworkers of SA & others* (at 1292), that, as every employee has the right to strike once the provisions of s 64 of the LRA 1995 have been satisfied, a strike pursuant to a trade union's demand to acquire organisational rights is not unlawful merely because the union's constitution does not include the employer's industry within its scope.

**Settlement Agreements**

The Labour Appeal Court confirmed that, where the Labour Court has made a settlement agreement resolving a wage dispute an order of court, the settlement agreement is in fact a collective agreement and the order of court does not give the contract between the parties the status of a court order to be enforced by contempt proceedings if breached. The parties must utilise the provisions of the LRA 1995 to deal with a dispute arising out of the collective agreement or its interpretation (*Public Servants Association of SA on behalf of Members v Gwanya NO & another* at 1275).

In *Schroeder & another v Pharmacare Ltd t/a Aspen Pharmacare* (at 1349) the Labour Court found that it did not have jurisdiction to entertain a challenge to the validity of a settlement agreement purporting to terminate the employee's employment by mutual consent. Whether the agreement was concluded as a result of duress, misrepresentation or the like was an issue properly to be determined by an arbitrator in the course of an enquiry into the existence of the dismissal.

**Residual Unfair Labour Practice**

Where the post occupied by a public service employee had been upgraded, the Labour Appeal Court confirmed that being the incumbent in the post did not give the employee a right to promotion. Nonetheless, his claim for the higher salary attached to the post as of right was not an 'interest dispute' but a 'rights dispute', and the bargaining council had jurisdiction to deal with the dispute (*Mathibeli v Minister of Labour* at 1215).

**Automatically Unfair Dismissal — Compensation**

In *Heath v A & N Paneelkloppers* (at 1301) the Labour Court found that the employee's dismissal was automatically unfair for reasons relating to her pregnancy. In determining the appropriate compensation to be awarded, the court was of the view that the employer's unconditional offer to reinstate the employee shortly after her dismissal had a direct and material impact on the amount of compensation to be awarded. It noted various factors the court should consider when exercising its discretion relating to the award of compensation and the fact that compensation for dismissal for a prohibited reason carries a punitive element, and determined that an award of six months' compensation was appropriate in the circumstances.

**Dismissal — Team Misconduct**

The Labour Court has confirmed that, in a case of 'team misconduct', just as in the case of derivative misconduct and common purpose, there is no need to prove individual guilt. It is sufficient that the employee is a member of the team, the members of which have individually failed to ensure that the team meets its obligations to the employer, in this case, to ensure that there were no stock losses (*True Blue Foods (Pty) Ltd t/a Kentucky Fried Chicken v Commission for Conciliation, Mediation & Arbitration & others* at 1375).

**Unfair Dismissal — Reinstatement**

In *Themba v Mintroad Sawmills (Pty) Ltd* (at 1355) the Labour Court dealt with the separate discretion the court or an arbitrator exercises when determining reinstatement and when determining the retrospectivity of reinstatement. The court found that an unfairly dismissed employee has, over and above his right to remuneration, a right to annual increases and annual bonuses from the date of reinstatement to the date of commencement of employment where he can show that such right is founded in contract, a collective agreement or a statutory instrument.

**Arbitration Awards — Review**

In *Minister of Safety & Security & another v Madikane & others* (at 1224) the Labour Appeal Court pointed out that the rule of practice that a reviewing court will not readily interfere with factual findings

of an arbitrator is not inflexible — the factual findings of arbitrators are not cast in stone and may be interfered with if they are unreasonable or based on misdirection and are material in that they impact on the outcome of the matter. In this matter the arbitrator had not taken into account all the evidence in deciding whether the charge of misconduct had been proved against the employee, and this amounted to a material misdirection.

**Public Service — Interpretation of Collective Agreements**

A bargaining council arbitrator found that, as the Department of Public Service & Administration was the custodian of all collective agreements in the public service and it had already pronounced upon the interpretation of a particular collective agreement, he had no authority to override that interpretation or to interpret the agreement again (*National Education Health & Allied Workers Union on behalf of Mushanganyisi & others and Department of Agriculture, Forestry & Fisheries & others* at 1397).

**Local Government — Suspension of Managers**

In *Mojaki v Ngaka Modiri Molema District Municipality & others* (at 1331) the Labour Court found that, where the municipal manager had been given 48 hours and not seven days within which to make representations why he should not be suspended, this had constituted sufficient compliance with the provisions of regulation 6 of the Local Government: Disciplinary Regulations for Senior Managers 2010. His suspension was therefore valid and an application to interdict his suspension was dismissed. However, in *SA Municipal Workers Union on behalf of Matola v Mbombela Local Municipality* (at 1341), the court found that the respondent municipality had failed to comply with the provisions of regulation 6 when it decided unilaterally to impose special leave on a manager instead of placing him on precautionary suspension. The court found further that special leave could only be granted at the instance or with the consent of the employee. The decision to place the manager on special leave was, therefore, unlawful.

**Bargaining Councils — Review of Awards and Jurisdiction**

The Labour Appeal Court commented, in *Arends & others v SA Local Government Bargaining Council & others* (at 1200), that parties wishing to proceed at arbitration without oral evidence in the form of a special case should submit a written statement of agreed facts, akin to a pleading. In the absence of such a document, the presiding officer, as the arbitrator in this matter, may not be in a position to answer the legal question put to him.

In *Gossman and Pex Hydraulics Cape Town CC* (at 1392) an arbitrator ruled that the bargaining council had jurisdiction over the employee's unfair dismissal dispute where his contract had been concluded and cancelled in South Africa although the employee had rendered services in Zambia.

**Practice and Procedure**

The Labour Court confirmed, in *Zondo & others v St Martin's School* (at 1386), the binding nature of pretrial minutes, and refused to declare pretrial minutes null and void where the applicants failed to show that their attorney had been intimidated into signing the minutes and did not have a mandate to sign them.

**Quote of the Month:**

Coppin AJA in *Minister of Safety & Security & another v Madikane & others* (2015) 36 *ILJ* 1224 (LAC):

> 'The rule of practice that [appellate and reviewing] courts will not readily interfere with [factual] findings is not an inflexible one. The factual findings of an arbitrator are not cast in stone and may be interfered with if they are unreasonable or based on a misdirection or are material in that

they impact on the outcome of the matter. The rule was never intended to "tie the hands" of the appeal or reviewing court, but was intended to assist those courts to do justice.'