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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Unfair Discrimination and Affirmative Action

The purpose of restitutionary measures contemplated in the Constitution 1996 and the Employment Equity Act 55 of 1998 and the test to be applied when determining whether an employment equity plan is compatible with the Constitution have been dealt with in two matters before the Labour Appeal Court. In *SA Police Service v Public Service Association of SA & others* (at 1828) the court found that the SA Police Service had an employment equity plan in KwaZulu-Natal which was objective, reasonable and justifiable, and that the national commissioner's refusal to promote an Indian male, a member of an over-represented designated group, and instead to promote a black male, a member of an under-represented designated group, did not amount to unfair discrimination. In *Solidarity & others v Department of Correctional Services & others (Police & Prisons Civil Rights Union as Amicus Curiae)* (at 1848) the court upheld the Labour Court's decision that the Department of Correctional Services' employment equity plan for the Western Cape failed to comply with the mandatory requirement of s 42 of the EEA that both national and regional demographics had to be considered, and that this failure amounted to unfair discrimination.

The Constitutional Court found, in *Mbana v Shepstone & Wylie* (at 1805), that a firm of attorneys which had an employment policy for candidate attorneys, did not unfairly discriminate against a black female candidate attorney on the grounds of race and social origin when it refused to deviate from its policy to accommodate her. However, in *MIA v State Information Technology Agency (Pty) Ltd* (at 1905), the Labour Court found that the employer's maternity leave policy discriminated against same-sex couples. It found that the maternity leave policy had to be interpreted or amended adequately to protect the rights flowing from the Civil Union Act 17 of 2006 and the Children's Act 38 of 2005 and that there was no reason why

a person in the employee's position was not entitled to the same maternity leave as a natural mother.

Transfer of Business as Going Concern

In *Communication Workers Union & others v Mobile Telephone Networks (Pty) Ltd & another* (at 1819) the Labour Appeal Court noted that the application of s 197 of the LRA 1995 depends upon a finely grained analysis of the facts of a particular case to produce an answer to the key question whether in substance a discrete business operation has been transferred from one entity to another entity.

In *Kunyuza & another v Ace Wholesalers (Pty) Ltd & others* (at 1895) the Labour Court was satisfied that the Constitutional Court had, in *National Union of Metalworkers of SA v Intervalve (Pty) Ltd & others* (2015) 36 *ILJ* 363 (CC), distinguished cases where a business has been transferred as a going concern and indicated that failure to cite a party in a referral to conciliation was not a bar to the joinder of that party to Labour Court proceedings when the party was the 'new employer' after a s 197 takeover. In addition, as the new employer stepped into the shoes of the old employer, it had an interest in the outcome of the dispute and had to be joined. However, in *Wallejee & another v FCSA Organisation Service (Pty) Ltd & another* (at 1943), the court found that the employee had been aware of the alleged transfer of the business but had done nothing to ensure joinder of the new owner of the business until after she was unsuccessful in enforcing a judgment in her favour against her employer. She had therefore waived the right to join the new owner. In addition, the court found that there had, on the evidence before it, been no transfer of a business as a going concern.

Temporary Employment Services

In two matters the Labour Court dealt with automatic termination clauses in contracts of employment of employees employed by temporary employment services. In *Kelly Industrial Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 1877), where the employment contracts provided for automatic termination on completion of a particular project and the employees' contracts were terminated before the completion of the project, the court found that the employees had been dismissed. In *SA Transport & Allied Workers Union on behalf of Dube & others v Fidelity Supercare Cleaning Services Group (Pty) Ltd* (at 1923), where the employment contracts provided for automatic termination should the client terminate its contract with the employer, the court found that the clause was invalid in terms of s 5 of the LRA 1995 as it was impermissible for employees to waive the protections against unfair dismissal afforded by the LRA. The

court noted that, in terms of the recent amendments to the LRA, such clauses are now prohibited and statutorily invalid.

Unfair Dismissal

In an application to set aside his dismissal and compel his employer to continue with an uncompleted disciplinary hearing, the employee contended that he had a contractual and a statutory right to a fair disciplinary hearing which the employer had denied him by terminating his employment before he had been heard. The Labour Court found that the substance of the dispute concerned the employee's dismissal and his complaint that the dismissal had been substantively and procedurally unfair. In the circumstances, s 191 of the LRA 1995 prescribed how the employee had to pursue his complaint — he had to refer his dispute to the appropriate forum, namely the CCMA. The Labour Court had no jurisdiction and dismissed the application (*Reddi v University of KwaZulu-Natal* at 1915).

Constructive Dismissal

An employee's complaint of sexual harassment against two colleagues in her office had been investigated, disciplinary hearings conducted, and the perpetrators exonerated. The employer instructed her to return to her office, but she resigned instead. She referred a constructive dismissal dispute to the CCMA, alleging that her working conditions had become intolerable and she could not be expected to work with the perpetrators. The CCMA commissioner was satisfied that the employer had taken all reasonable steps expected of it; that there was no causal nexus between the employee's resignation and the employer's conduct; that the employee had failed to show any culpability on the part of the employer; and that the employee had ulterior motives for resigning. He, therefore, found that the employee had not been constructively dismissed (*Pillay and Old Mutual Property (Pty) Ltd* at 1961).

Judicial Officers — Bias

In *Mbana v Shepstone & Wylie* (at 1805) the Constitutional Court noted that the courts treat allegations of actual or perceived bias based on the conduct of a judge during trial differently to allegations of actual or perceived bias owing to a judge's associations. However, in both instances a litigant must show a reasonable apprehension of bias to succeed. It found, inter alia, that it is not in the interests of justice to permit a litigant who has full knowledge of alleged actual bias to wait until an adverse judgment is pronounced before raising these allegations.

Legal Practitioners — Conduct

An undertaking given by one attorney to another is a matter of utmost

good faith and, if breached, this reflects not only on the integrity of the attorney but also on the integrity of the profession as a whole. Where an employee's attorneys had, on the instructions of their client, given the employer's attorneys an undertaking not to execute a writ of execution, the Labour Court had no hesitation in finding that the undertaking was binding and had to be honoured (*Eskom Holdings SOC Ltd v Commission for Conciliation, Mediation & Arbitration & others* at 1872).

Legal Representation at Arbitration Proceedings

In rulings on the right to be permitted legal representation, both a CCMA commissioner and a bargaining council arbitrator considered the constitutional validity of the limitation on the right to legal representation before tribunals other than courts of law. The CCMA commissioner granted the employee the right to be represented by his attorney (*Homoyi and Harrogate Projects CC* at 1957), but the bargaining council arbitrator refused the employee permission to be represented where the considerations of law and fact were not unique and the issues were routinely considered in all unfair dismissal disputes (*Naidoo and Barrows Design & Manufacturing* at 1986).

Practice and Procedure

When determining whether an application to review a private arbitration award in terms of the Arbitration Act 42 of 1965 has been filed timeously, the six-week period is calculated according to the civil method of computation, which provides that the first day is included and the last day is excluded. Relying on this method, the Labour Appeal Court ruled that the applicant union had filed its review application late and should have applied for condonation (*SA Transport & Allied Workers Union & another v Tokiso Dispute Settlement & others* at 1841).

In *Eskom Holdings SOC Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 1872) the Labour Court granted an application to stay a writ of execution where the employee's attorneys failed to honour an undertaking to the employer's attorneys not to proceed with execution. In *Windybrow Theatre v Maphela & others* (at 1951) the Labour Court set aside the attachment of funds in a bank account of the employer by the sheriff. It found that the attachment was unlawful and invalid as the sheriff had not complied with rule 45(12)*(a)* read with rule 45(8) of the High Court Rules which required that the employer had to be notified of the attachment.

A public service employee referred a dispute in terms of s 24 of the LRA 1995 to the relevant bargaining council. The arbitrator found that the employee was not covered by the OSD collective agreement and therefore not entitled to the salary stipulated in the OSD. She then referred a dispute in terms of s 186(2)*(a)* claiming that failure to pay her according to the OSD salary scale amounted to an unfair labour practice, which was also unsuccessful. On review of the second award, the Labour Court found

that the matter was res judicata — the relief sought by the employee against the employer in the two referrals was the same although she had used two different causes of action in pursuit of that relief. The arbitrator had, therefore, not had jurisdiction to determine the second referral (*Public Servants Association on behalf of Traut v Department of Correctional Services (Western Cape) & others* at 1911).

Quote of the month:

Mosime AJ in *SA Transport & Allied Workers Union on behalf of Dube & others v Fidelity Supercare Cleaning Services Group (Pty) Ltd* (2015) 36 *ILJ* 1923 (LC), commenting on the protection afforded to employees of labour brokers by the Labour Relations Amendment Act 6 of 2014:

'It can no longer be debatable that, following this legislative directive, labour brokers may no longer hide behind the shield of commercial contracts to circumvent legislative protections against unfair dismissal. A contractual provision that provides for the automatic termination of the employment contract and undermines the employee's rights to fair labour practices, or that clads slavery with a mink coat, is now prohibited and statutorily invalid.'