VOLUME 36 DECEMBER 2015

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Compensation — Just and Equitable

The employee in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* (at 2989), whose employment had been terminated at the age of 64 instead of 65, claimed both compensation for automatically unfair dismissal under the LRA 1995 and compensation and damages under the Employment Equity Act 55 of 1998. The Labour Appeal Court upheld the Labour Court's finding that he was entitled to claim compensation under both Acts arising from the same facts. It also considered the meaning of 'just and equitable' compensation, but cautioned that the employer should not be penalised twice for the same wrong.

The employee in *Solidarity on behalf of Van Emmenis v Sirius Risk Management (Pty) Ltd* (at 3175) was retrenched and the Labour Court found his dismissal to be procedurally unfair. The court considered the purpose of compensation in terms of s 194 of the LRA 1995 and found that it was permissible, when determining what was just and equitable, to take into account the employee's interest in a competing business while he was still employed by the employer.

Labour Court — Jurisdiction

The Labour Appeal Court found that where a dispute between parties relates to the interpretation and application of a collective agreement that has to be conciliated and arbitrated, the parties cannot bring a claim directly to the Labour Court and request that it sit as an arbitrator in terms of s 158(2)*(b)* of the LRA 1995 (*Member of the Executive Committee of the Western Cape Provincial Government Health Department v Coetzee & others* at 3010).

In *Business Unity SA v Minister of Higher Education & Training & others* (at 3057) the Labour Court found that it has exclusive jurisdiction to consider challenges to the regulations made under the Skills Development Act 97
of 1998.

CCMA — Jurisdiction

In *Ngobe v J P Morgan Chase Bank & others* (at 3137) the Labour Court found that a party referring a dispute to the CCMA must stand or fall on the merits of that dispute. Where the parties make a conscious decision to run a case in arbitration in full appreciation of the jurisdictional consequences of their election, it is not appropriate for commissioners to intervene and dictate to parties how what the commissioner believes to be the real dispute should be litigated.

Disciplinary Penalty — Selective Treatment

In *Gemalto SA (Pty) Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Louw & others* (at 3002) the Labour Appeal Court found that the employer had acted unfairly when it singled out a few employees for discipline and dismissal.

Skills Development Act 97 of 1998 — Validity of Grant Regulations

In *Business Unity SA v Minister of Higher Education & Training & others* (at 3057) the Labour Court found that two of the regulations contained in the Grant Regulations 2012 were invalid, namely, regulation 3(12) which provided for unspent surplus funds to be swept into the National Skills Fund and regulation 4(4) which provided for the reduction in the mandatory grant from 50% to 20%.

Bargaining Council — Extension of Collective Agreement

The Labour Court found, in *Aviation Union of Southern Africa & others v SA Airways SOC Ltd & others* (at 3030), that a collective agreement settling a retrenchment may be extended in terms of s 23(1)*(d)* of the LRA 1995 to non-parties and settles all disputes concerning the retrenchment process.

Transfer of Business as Going Concern

In *SA Transport & Allied Workers Union & another v Member of the Executive Committee: Gauteng Roads & Transport & others* (at 3155) the Labour Court gave a detailed analysis of recent judgments on the meaning of the transfer of a business as a going concern in the context of outsourcing of services and the approach adopted by South African and foreign courts to determining whether there has been a transfer sufficient to satisfy the requirements of s 197 of the LRA 1995.

Settlement Agreement

In *Cindi v Commission for Conciliation, Mediation & Arbitration & others* (at 3080) the Labour Court confirmed that a settlement agreement facilitated before a CCMA commissioner that has not been made an arbitration award in terms of s 142 of the LRA 1995 cannot be reviewed.

Unilateral Change to Terms and Conditions of Employment

The employer unilaterally introduced a change to its employees' working hours and the union referred a dispute in terms of s 64(4) of the LRA 1995 to the CCMA. Instead of restoring the status quo ante, the employer dismissed the employees for insubordination for refusal to obey its instruction to work the new hours. The Labour Court noted that the employer's recourse in this instance was to lock the employees out until they agreed to the change or to embark on a retrenchment process. However, it could not impose the unilateral change and instruct the employees to work in accordance with the new terms and conditions. In the circumstances the instruction was not reasonable and the employees' refusal to comply did not amount to insubordination (*Independent Commercial Hospitality & Allied Workers Union & others v Commission for Conciliation, Mediation & Arbitration & others* at 3086).

Trade Unions — Registration

In an appeal to the Labour Court in terms of s 111(3) of the LRA 1995 from a decision of the Registrar of Labour Relations refusing to register a trade union, MATUSA, the court found that it was not rational to bar an as yet unregistered union from registration on the ground that it was not fully operationally in terms of its constitution. It found further that the registrar no longer enjoyed a majoritarian gatekeeper role at registration stage and could not prevent the formation of new unions by disgruntled members of existing unions (*Municipal & Allied Trade Union of SA v Crouse NO & others* at 3122). Instead of appealing in terms of s 111(3), the union in *SA Security & General Workers Union v Registrar of Labour Relations* (at 3149) approached the Labour Court to review the registrar's decision to refuse its registration. In this matter the court upheld the registrar's decision because the union membership had not elected office-bearers, nor adopted a constitution or name. In addition, the union had not provided the registrar with bank statements and not verified the payment of membership fees.

Dismissal — Distribution of Racist Email on Employer's Server

A CCMA commissioner found that the an employee's dismissal for distributing a racist email using his employer's server was unfair where it was open to interpretation whether the email was in fact racist and not merely offensive; where the employee had sent the email to the grievant in error and expressed remorse for his conduct; and where other employees who had circulated the same email had only been given warnings for the same offence (*Kruger and Glencore SA (Pty) Ltd (Wonderkop Smelter)* at 3191).

Resignation

In *Mnguti v Commission for Conciliation, Mediation & Arbitration & others* (at 3111) the Labour Court confirmed that it is possible for an employee to resign by way of conduct or verbally without submitting a written resignation. In this matter the court found that the employee's conduct clearly indicated that he had unequivocally indicated his intention to leave employment and had done so immediately and finally.

Local Authority — Municipal Manager — Precautionary Suspension

In *Mere v Tswaing Local Municipality & another* (at 3094) the Labour Court considered the authority and powers of an administrator appointed in terms of s 139 of the Constitution 1996. It found that the administrator steps into the shoes of the municipal council and fulfils all the functions that the council normally fulfils, including the suspension of senior managers in terms of regulation 6 of the Local Government: Disciplinary Regulations for Senior Managers 2010.

Football Player — Breach of Contract

In *Bloemfontein Celtic Football Club and Abraw & another* (at 3213) the chairman of the Dispute Resolution Chamber of the NSL considered the nature of a 'pre-contract', which is a species of footballing contract in terms of which a player enters into an agreement of promise to conclude an employment contract with another club after the end of his current contract.

Practice and Procedure

The Labour Court pointed out, in *Bafokeng Rasimone Platinum Mine (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 3045), that the supplementary affidavit in review proceedings is the final statement of the applicant's grounds of review, and ruled that, after the close of pleadings, the court will only permit additional affidavits in exceptional circumstances.

In *SA Police Service v Safety & Security Sectoral Bargaining Council & others* (at 3143) the Labour Court confirmed that, where a court hands down judgment providing full reasons and an order ex tempore, the date of judgment is the date on which the oral judgment is handed down.

Quote of the Month: Snyman AJ in *Mere v Tswaing Local Municipality & another* (2015) 36 *ILJ* 3094 (LC), commenting on an urgent interdict by a municipal manager to declare his precautionary suspension by an administrator appointed in terms of s 139 of the Constitution 1996 to be invalid and unlawful: 'This is yet another instance of a case arising out of a dysfunctional municipality, in which intervention of the provincial government was needed to fulfil the tasks in place and stead of the senior management and the council of the municipality, and then ending up before this court. I remain concerned with the large number of these kinds of cases which find their way to this court, which can only serve to further hamper service delivery to the residents of such municipalities.'