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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Retrenchments — Mass Retrenchments

The majority of the Constitutional Court has upheld the decision of the Labour Appeal Court in *Edcon v Steenkamp & others* (2015) 36 *ILJ* 1469 (LAC) that, where an employer fails to comply with the time periods set out in s 189A(2)*(a)* read with s 189A(8) of the LRA 1995 and prematurely dismisses employees, the dismissal is not invalid and of no force and effect (*Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)* at 564).

Incomplete Arbitration Record on Review

In *Baloyi v Member of the Executive Committee for Health & Social Development, Limpopo & others* (at 549) the majority of the Constitutional Court found that it had been improper for the Labour Court to dismiss an application to review an arbitration award where there was no proper record of the arbitration proceedings. It ought to have remitted the matter for rehearing. However, the court decided that it was no longer appropriate to send the matter back for a rehearing and that it was just and equitable for the court to order the reinstatement of the employee.

Jurisdiction — High Court and Labour Court

The Supreme Court of Appeal considered two conflicting decisions on jurisdiction to review the decision of the Minister of Labour to extend bargaining council agreements to non-parties in terms of s 32(2) of the LRA 1995 (*Valuline CC & others v Minister of Labour & others* (2013) 34 *ILJ* 1404 (KZP) and *O Thorpe Construction & others v Minister of Labour & others* (2015) 36 *ILJ* 935 (WCC)). It restated the correct approach to the determination of the Labour Court's jurisdiction and confirmed that the Labour Court and the Labour Appeal Court are superior courts with exclusive jurisdiction to decide matters arising from the LRA, including

the question whether there has been compliance with the provisions of s 32. The court accordingly approved the decision in *O Thorpe Construction* and rejected that in *Valuline* (*Motor Industry Staff Association v Macun NO & others* at 625).

Jurisdiction — CCMA

The Labour Court has found that the CCMA has not been given jurisdiction to issue writs of execution in respect of its arbitration awards in terms of the recent amendments to s 143 of the LRA read with rule 40 of the CCMA Rules. Therefore clause 19 of the CCMA Practice and Procedure Manual (November 2014) that suggests that the CCMA may issue writs of execution or 'enforcement awards' is ultra vires (*MBS Transport CC v Commission for Conciliation, Mediation & Arbitration & others; Bheka Management Services (Pty) Ltd v Kekana & others* at 684).

In *Malgas and Midrand Graduate Institute (Pty) Ltd* (at 742) a CCMA commissioner found that, where an employer and an employee had entered into a settlement agreement terminating the employment relationship, the CCMA had jurisdiction to pronounce upon the validity of the settlement agreement and to uphold it or set it aside where the interpretation of the agreement arose in the course of the arbitration of an unfair dismissal dispute.

Strike — Issue in Dispute

The Labour Appeal Court, in *National Union of Metalworkers of SA & others v Transnet SOC Ltd* (at 638), found that, as the issue in dispute clearly concerned a refusal by the employer to bargaining with an unrecognised union, the union members could only embark on a strike after obtaining an advisory award. The union had failed to obtain an advisory award and the strike was, accordingly, unprotected.

Disciplinary Penalty — Interference with Penalty Handed Down by Chairperson

The Labour Appeal Court has upheld a decision of the Labour Court (*SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* (2010) 32 *ILJ* 1238 (LC)) and applied an earlier LAC decision (*SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 *ILJ* 656 (LAC)) that an employer that has entered into a collective agreement obliging it to implement the disciplinary decisions of the chairpersons of disciplinary hearings is not entitled thereafter to interfere with those decisions or to substitute its own decisions for those of the chairpersons. The court said that the established law that an employer is disallowed from interfering in the outcome of such a disciplinary enquiry has as its aim the protection of workers from arbitrary interference with discipline in a fair system of labour relations, and is a principle worthy of

protection (*SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* at 655).

Disciplinary Rule

In *National Union of Metalworkers of SA and Transnet SOC Ltd* (at 755) a bargaining council arbitrator found that a disciplinary rule which prohibited employees from wearing the regalia of unrecognised unions in the workplace was valid and reasonable and was imposed to promote an orderly workplace and to prevent union rivalry from disrupting operations. The arbitrator therefore found that employees who wore T-shirts of a minority unrecognised union were in breach of the rule and that the employer had fairly disciplined them for breaching the rule.

Contract of Employment — Recruitment Incentive and Retention Incentive

In *Renaissance BJM Securities (Pty) Ltd v Grup* (at 646) the Labour Appeal Court noted the distinction between a recruitment incentive (a sign-on bonus) and a retention incentive (a stay-on bonus). It upheld a Labour Court decision (*Grup v Renaissance BJM Securities (Pty)* Ltd (2014) 35 *ILJ* 3400 (LC)) that an undertaking by the employer to compensate the employee for the deferred equity compensation he would forfeit on resignation from his previous employer vested on the signing of his employment contract and was a sign-on incentive. The employee's claim to the compensation in terms of the undertaking therefore survived the termination of the employment contract.

Contract of Employment — Automatic Termination Clause

In *Pecton Outsourcing Solutions CC v Pillemer NO & others* (at 693) the Labour Court confirmed that an automatic termination clause which provides for termination of a temporary employment service employee's contract of employment at the whim of a client is at variance with s 5 of the LRA 1995.

Demarcation Award

The scope of registration of the National Bargaining Council for the Road Freight & Logistics Industry is defined in its certificate of registration as 'the transportation of goods for hire or reward by means of motor transport'. In a demarcation award a CCMA commissioner ruled that the term 'goods' included money or cash, and that consequently the applicant company's cash in transit division fell within the council's scope of registration. This award was upheld on review by the Labour Court (*SBV Services (Pty) Ltd v National Bargaining Council for the Road Freight & Logistics Industry & others* at 708).

Unfair Discrimination

Where an employee claimed that she had been unfairly discriminated against by the municipality in terms of s 6(4) of the Employment Equity Act 55 of 1998 because she was paid less than other managers who performed work of equal value, the CCMA commissioner noted that, in considering whether the employer's conduct constituted unfair discrimination, the rationality and not the correctness of the employer's conduct had to be assessed. In order to constitute discrimination, differentiation had to be based on 'attributes or characteristics which have the potential to impair the fundamental human dignity of persons as human beings or affect them adversely in a comparably serious manner'. In this matter a post was graded and not the employee; and this grading applied regardless of who was appointed. It could thus not be said to have anything to do with an attribute or characteristic of the employee (*Govender and Umgungundlovu District Municipality* at 724).

Sexual Harassment

The CCMA dealt with the liability of employers, in terms of s 60 of the Employment Equity Act 55 of 1998, for sexual harassment of employees in two matters. In *KO and Kusasa Commodities 332 CC t/a Twin Peak Spur Steak Ranch* (at 735) the commissioner found that where the employer had trivialised an incident where a senior male employee had sexually harassed a subordinate male employee, its conduct amounted to unfair discrimination and it had to be held to be statutorily liable. However, in *Ntsundu and Three Cities Inn on the Square (Pty) Ltd* (at 749) the commissioner found that, where an employee alleged that she had been sexually harassed by hotel guests, the employer hotel could only be held liable for the conduct of its employees under the EEA and could not be held accountable for the actions of its guests.

Evidence — Documentary Evidence

The Labour Court on review found that a CCMA commissioner had erred when he found that computer-generated transaction records showed no nexus between the loss suffered by the employer and the conduct of the employees. The records were produced in the ordinary course of business and were commented on, explained and confirmed by the witness who generated the records and had personal knowledge of what they purported to show. Furthermore, the employees could not simply deny the authenticity of the records with no substantial challenge to counter the substance of such evidence (*Fairway at Randpark Operations (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* at 675).

Quote of the Month

Musi JA in *Renaissance BJM Securities (Pty) Ltd v Grup* (2016) 37 *ILJ* 646 (LAC), when distinguishing between a recruitment incentive and a retention incentive in a contract of employment:

'Retention agreements are therefore hand-outs with handcuffs or cheques with chains. The employee is given money and in return, he/she must give up his/her freedom to leave the employ of the employer. It curtails the employee's right to jump ship even when the ship is being steered straight in the direction of an iceberg.'

The following judgments were amongst the judgments considered for possible publication during the past three months of the year. The full text of most of these judgments can be found at www.saflii.org.za.

Residual Unfair Labour Practices — Promotion

A SSSBC arbitrator had found that the failure by the SAPS to shortlist the applicant employee for a senior post was not unfair. On review, the Labour Court found that the SAPS had provided no evidence before the arbitrator why it had not shortlisted the employee and why it had appointed a candidate who did not qualify for the position. Moreover, there were several irregularities relating to the selection process that any reasonable arbitrator would have considered, and the arbitrator's failure to do so render his award unreasonable. The court reviewed and set aside the award. It ordered the SAPS to compensate the employee and also set aside the appointment of the successful candidate (*Mbatha v Safety & Security Sectoral Bargaining Council & others* JR372/2013 dated 30 September 2015). In *Ekurhuleni Metropolitan Municipality v Lucwaba NO & others* (JR1639/2012 dated 25 November 2015) the court confirmed that the failure to shortlist a candidate for promotion can constitute an unfair labour practice.

Dismissal — Misconduct — Breach of Rule

In *Metrorail (PRASA) v SA Transport & Allied Workers Union on behalf of Tshabalala & others* (JR483/2013 dated 5 October 2015) the Labour Court found, inter alia, that the CCMA commissioner had committed a gross irregularity by finding that a rule prescribing certain conduct by employees had to be in writing. The rule was established by the undisputed evidence of several witnesses and was a simple and logical operational process which had been in existence for a long time — it did not need to be reduced to a written document as it had been tacitly established by way of conduct or practice.