

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Delay in Proceedings

The Constitutional Court has, in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 313), upheld a Labour Court decision dismissing a review application on the basis of the applicant company's inordinate delay in pursuing the review. It confirmed that labour disputes, by their nature, required speedy resolution and a delay in resolution of such disputes undermined the primary object of the LRA 1995 and was detrimental to both employees and employers. In a minority judgment, Zondo J listed certain practical measures that the CCMA and bargaining councils could adopt to minimise the long-standing problem of missing tapes and incorrect records of arbitration proceedings conducted before them.

In *Police & Prisons Civil Rights Union v Ledwaba NO & others* (at 493) the Labour Court refused an application for leave to appeal where the applicant had failed to prosecute his appeal for two years without given any explanation for the delay. The delay was grossly excessive, prejudicial to the other parties and an abuse of process.

In *National Union of Metalworkers of SA on behalf of Mchunu and Hulamin Ltd* (at 524) a bargaining council arbitrator dismissed an application to continue arbitration proceedings where the dispute had been part heard in 2012 and re-enrolled three years later in 2015. The arbitrator found that, as dominus litis, the employee had to ensure that the matter was prosecuted to finality within a reasonable time; and, in cases of unjustifiable delay such as this, the employee could be prevented from proceeding with the matter.

Prescription

The Labour Appeal Court delivered a single judgment in respect of three matters which dealt with the prescription of arbitration awards. Having

considered the purpose of extinctive prescription and finding that the provisions of the LRA 1995 were not inconsistent with those in the Prescription Act 68 of 1969, the court concluded that an arbitration award that creates an obligation to pay or render to another, or to do something, or to refrain from doing something, meets the definitional criteria of a ‘debt’ as contemplated in the Prescription Act. No distinction should be drawn between awards for compensation and awards for reinstatement or re-employment, and the period of prescription is three years (*Myathaza v Johannesburg Metropolitan Bus Service (SOC) Ltd t/a Metrobus; Mazibuko v Concor Plant; Cellucity (Pty) Ltd v Communication Workers Union on behalf of Peters* at 413).

In *Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd) v National Union of Metalworkers of SA & others* (at 386) the Labour Appeal Court confirmed its earlier decision that an order of reinstatement revives the employment contract terminated by dismissal and does not encompass an order quantifying the arrear wages payable for the period from the date of the reinstatement order to date of compliance with that order. An employee’s contractual claim for arrear wages becomes a ‘debt due’ within the meaning of s 11(d) of the Prescription Act and prescription begins to run from the date of the reinstatement order.

Educator — Sexual Relationship with Learner

In *Grey v Education Labour Relations Council & others* (at 379) the Labour Appeal Court noted that the law reflects that sexual misconduct by an educator with a learner constitutes an abuse, not only of the authority and responsibility vested in the educator, but also of the rights of the child given that no child has an equal power to say ‘no’ to a parental figure or to anticipate the consequences of sexual involvement with a caretaker.

Employment Equity — Medical Testing of Employee

The Labour Court found, in *EWN v Pharmaco Distribution (Pty) Ltd* (at 449), that an employer cannot rely on an employee’s consent to medical testing to avoid the prohibition of medical testing provided for in s 7(1)(a)-(b) of the Employment Equity Act 55 of 1998. It found further that the dismissal of the employee for refusal to undergo a medical examination which she would not have been required to undergo but for her bipolar condition was automatically unfair and that the employer’s conduct in singling out the employee to undergo a psychiatric examination on account of her bipolar status amounted to unfair discrimination.

Strikes — Interdicts against Strike Action

The Labour Court has criticised the practice whereby applicants seek interim relief against strike action which is not truly interim, apparently in order more easily to meet the lower threshold required, setting a return day several weeks later, by which time any final order is usually academic.

In this way the court becomes a vehicle through which the power play between the parties to industrial action is continued by other means, and the court order interferes with the power dynamics, more often than not having a profound effect on the constitutional right to strike. The court found, therefore, that the respondent union was entitled to anticipate the return day of the rule nisi in order to have the applicant employer's claim reconsidered in the light of the more stringent test for final relief without establishing any additional facts (*National Union of Food Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits & Allied Workers & others* at 476).

CCMA — Jurisdiction

The Labour Appeal Court has found that there is no reason why the principle that jurisdiction is to be assessed on the pleadings properly construed should not apply to the CCMA and the documents in that forum. Therefore, where the employee averred that the employer's location was in South Africa and the employer did not contest this, there was no reason why the CCMA should not hear the matter. The employee was employed by SA Tourism, established in terms of the Tourism Act 72 of 1993, in its London office. The court found that this office was not an independent undertaking divorced or separated from the South African undertaking, it was part and parcel of the principal undertaking. The locality of the employer's undertaking was located in South Africa, and the CCMA had jurisdiction to determine the employee's dismissal dispute (*Monare v SA Tourism & others* at 394).

CCMA — Conduct of Proceedings

In *Innovation Maven (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 465) the Labour Court restated the correct approach to be adopted by commissioners when conducting arbitration proceedings. It found that in this matter the commissioner had intervened to such an extent in the proceedings before her that she had failed to afford the parties a fair hearing and her conduct had given rise to a reasonable apprehension of bias.

Organisational Rights

In an application for organisation rights in terms of s 21(2) of the LRA 1995, a commissioner of the CCMA found that the employer was not a temporary employment service but an independent contractor. He found further that the premises of the client at which its employees were employed was a 'workplace' and that the employees were therefore entitled to seek organisational rights at that workplace (*General Industries Workers Union of SA on behalf of Members and Bidvest TMS Group* at 508).

Dismissal — Probationary Employee

In *Moodley and Skill Hunters (Pty) Ltd* (at 511) a CCMA commissioner found that an employee was employed on a probationary contract and not a fixed-term contract and that the termination of her services without giving her an opportunity to make representations and without adequate guidance, training and counselling constituted an unfair dismissal. However, in *Thobejane and Buthelezi EMS (Pty) Ltd* (at 517) a CCMA commissioner found that, where a probationary employee had engaged in conduct which amounted to serious misconduct and was unwilling to change his behaviour, no formal disciplinary hearing was required before the termination of his services.

Practice and Procedure

In *Edcon (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others: In re Thulare & others v Edcon (Pty) Ltd* (at 434) the Labour Court considered the provisions of the Labour Court Practice Manual relating to the archiving of review applications and the requirements that have to be met by an applicant who wishes to revive an archived review application.

In *Starfish Greathearts Foundation v Lekalakala* (at 501) the Labour Court suggested that it would be a salutary and practical course of conduct for litigants, upon receipt of a telefax from the court, to follow the procedure set out in clause 14.1.5 of the Labour Court Practice Manual to confirm that the other party or parties have also received the fax.

Quote of the Month:

Zondo J in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2016) 37 ILJ 313 (CC):

‘Courts should start to be very strict and firm with the CCMA and bargaining councils with regard to their duty to ensure that proper and complete records of arbitration proceedings conducted under their auspices are kept. In appropriate cases costs orders against the CCMA and bargaining councils may have to be seriously considered if this problem persists and no proper explanation is placed before the court as to what reasonable steps were taken to avoid it.’