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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Contract of Employment — Separation Agreement

After it came to the employer's attention that a senior management employee had made certain misrepresentations to it when he was interviewed for employment, the parties entered into a separation agreement which included a clause limiting the employee's right to seek judicial redress in the CCMA or the courts. The Labour Appeal Court found that such a clause is permissible when it is reasonable to limit the right to judicial redress and, when determining the issue, the relative position of the parties is relevant. The court found further that a term limiting judicial redress is not only commonplace, but is a practical approach to dispute resolution and, by its nature, is neither unlawful nor contrary to public policy. The court accordingly upheld the Labour Court's decision that the separation agreement was not invalid and of no force and effect (*Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd & another* at 902).

Skills Development Act 97 of 1998

In *Minister of Higher Education & Training v Hospital Association of SA & others* (at 913) the Labour Appeal Court found that the Minister of Higher Education & Training had acted contrary to the Skills Development Act 97 of 1998 and the regulations when he established a new SETA for the health and welfare sector, appointed new members and imposed a new constitution on the SETA.

Mine Health and Safety 29 of 1966

Following an accident underground at the employer's mine, a s 65 enquiry, presided over by the principal inspector of mines, was convened. The principal inspector, in his capacity as presiding officer, issued a report in terms of s 72 of the Mine Health and Safety Act 29 of 1966 in terms of which he recommended that an administrative fine be imposed. Thereafter,

acting in terms of s 55A, an inspector of mines recommended to the same principal inspector of mines that an administrative fine be imposed on the employer. The principal inspector of mines, acting in terms of s 55B, imposed an administrative fine on the employer. In an application to review the recommendation of the inspector of mines and the decision of the principal inspector of mines, the Labour Court was satisfied that both the recommendation and the decision constituted administrative action for purposes of the Promotion of Administrative Justice Act 3 of 2000. The court found that, given the attitude expressed in the s 72 report, the principal inspector of mines was in no position impartially and objectively to consider the recommendation in terms of s 55A — he had prejudged the matter, his mind was closed and he was thus disqualified on the ground of bias from exercising his power as principal inspector of mines in terms of s 55B. Both the recommendation and the decision were reviewed and set aside as unlawful and invalid administrative action (*Glencore Operations SA (Pty) Ltd Coal Division v Minister of Mineral Resources & others* at 966).

Employment Equity Act 55 of 1998

In *Solidarity v Minister of Safety & Security & others (Police & Prisons Civil Rights Union as Amicus Curiae)* (at 1012) the Labour Court found that the SA Police Service employment equity plan 2010–2014 was invalid and of no force and effect because it contravened ss 15(3) and 42 of the Employment Equity Act 55 of 1998 and s 9(2) of the Constitution 1996. The court considered the prevailing jurisprudence on the primary difference between employment equity targets and impermissible quotas, finding that the SAPS plan was not flexible and did not cater for exceptions, and was therefore defective as a remedial measure. It also found that, while it was legitimate to have regard to national demographics, the economically active population and not simply the national census figures had to be considered. In this respect, the plan did not comply with the EEA. The court said that the constitutional requirement that the public service had to be broadly representative of the population was perfectly consistent with a public service whose provincial racial profile matched that of the population in each province — the national demographic representation was not in conflict with the regional demographic representation. A nationally representative workforce which was also regionally representative would fit the varying geographic racial contours of the population much more than one that was not.

Dismissal — Conflict of Interest

The Labour Court found that a senior employee was under an obligation to make a full and frank disclosure of her close personal relationship with two applicants for employment to her fellow panellists before selection interviews. She was also required to recuse herself from the selection process. In failing to make such a disclosure and to recuse herself, the employee placed herself in a conflict of interest with her employer. The

court found that it amounted to serious misconduct to become involved in the recruitment process of people to whom one felt favourable in circumstances where one did not make full disclosure. The employee's dismissal was therefore found to be fair (*Coega Development Corporation (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* at 923).

Transfer of Business as Going Concern

The Labour Court found that the cancellation of a waste management service agreement and the appointment of a new service provider did not trigger the application of s 197 of the LRA 1995 where it was the established practice in the waste management industry that businesses competed against each other for tenders to provide services for a limited period. The court found further that the employees were all employed on fixed-term contracts for the duration of the service agreement and were aware that their contracts terminated with the service agreement. They, therefore, could have no reasonable expectation that their contracts of employment would be transferred to the new service provider (*Enviroserv Waste Management v Interwaste (Pty) Ltd t/a Interwaste Environmental Solutions & others* at 959).

Local Government Employees — Settlement Agreements

A local government employee took early retirement for operational reasons. The employee and the municipality entered into a settlement agreement relating to certain amounts owing to him on retrenchment. When the municipality failed to contribute a lump sum to the employee's pension fund in terms of the pension fund rules, the employee approached the High Court to compel it to do so. The court found that the settlement agreement did not compromise the employee's rights under the pension fund rules. The employee's pension rights were enshrined in a statute and the parties could not contract out of them; moreover such a compromise would be contrary to s 4 of the Basic Conditions of Employment Act 75 of 1997 and be contrary to public policy (*Heunis v Lejsweleputswa District Municipality & another* at 895).

A municipal manager entered into a settlement agreement with an employee while the employee was in the midst of a disciplinary hearing into misconduct. The presiding officer contended that the manager was not empowered to enter into a settlement agreement; continued with the hearing; and dismissed the employee. A bargaining council arbitrator found that the dispute had been settled by a valid and binding agreement and ordered the municipality to reinstate the employee. On review, the Labour Court found that neither the Local Government: Municipal Systems Act 32 of 2000 nor the collective agreement delegated the power to enter into settlement agreements to the municipal manager. He had therefore exceeded his powers, and the settlement agreement was invalid.

The employee's dismissal was upheld (*Saldanha Bay Municipality v SA Municipal Workers Union on behalf of Wilschut & others* at 1003).

Residual Unfair Labour Practice — Promotion

In *Pelindaba Workers Union on behalf of Erasmus and SA Nuclear Energy Corporation SOC Ltd* (at 1042) a CCMA commissioner found that the employer had not committed an unfair labour practice by not promoting an employee. Although the employee had acted in the higher post for a number of years and had been promised the promotion by her manager, the commissioner found that the promise was not unconditional and that it was subject to the employee obtaining certain qualifications, which she had not done.

CCMA Arbitration Proceedings — Conduct of Proceedings

In *Mashego v Cellier NO & others* (at 994) the Labour Court criticised the readiness of CCMA commissioners to relinquish jurisdiction at the first sign of an alternative cause of action being raised and without having heard all the evidence.

Practice and Procedure — Res Judicata

A CCMA commissioner had struck a matter from the roll and, when the matter was re-enrolled for hearing, he ruled that the matter was res judicata. On review, the Labour Court found that the commissioner had merely struck the matter from the roll when he made his first ruling and had not dismissed the dispute of the merits. He therefore did not make a ruling that was final in effect; the matter was not res judicata and the applicant employee was not precluded from re-enrolling it (*Mashego v Cellier NO & others* at 994).

Quote of the Month:

Not awarded.