

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Lock-outs

In *Transport & Allied Workers Union of SA v Putco Ltd* (at 1091) the Constitutional Court held that the LRA 1995 does not permit an employer to lock out members of a trade union that was not party to a bargaining council where a dispute arose and was referred for conciliation.

Fiduciary Duties of Members of Close Corporations

The High Court found that, where a member of a close corporation had acted duplicitously by competing with the corporation, soliciting and diverting its existing clients to a competitor, and disparaging the corporation, he had breached his fiduciary duties as contemplated in s 42 of the Close Corporations Act 69 of 1984, and the other member of the close corporation was entitled to an interdict (*Harvey v Niland & others* at 1112).

Restraint of Trade Undertakings

The legal principles governing restraint of trade undertakings have been the focus of several recent Labour Court judgments. In *Vodacom (Pty) Ltd v Motsa & another* (at 1241) the Labour Court considered the concept of 'garden leave' and its relationship with a restraint of trade agreement. It noted that a garden leave clause generally provides that, if an employee gives notice, the employer may require the employee to spend the whole or part of the notice period at home, thus allowing confidential information to which the employee had access to become stale and keeping the employee out of the clutches of a competitor. It looked at the approach adopted by foreign authorities and supported that adopted by a New Zealand court that a garden leave provision should be taken into account by the court when

considering the reasonableness of the duration of any post-termination restraint covenant.

In *Vox Telecommunication (Pty) Ltd v Steyn & another* (at 1255) the Labour Court considered the distinction between a supplier restraint and a competitor restraint, and found that, if a company's goodwill requires protection by way of a supplier restraint, in principle there is nothing less enforceable about such a restraint than an employee restraint against soliciting customers or employees or joining a competitor.

Regarding the protection of customer connections, the court found, in *Medtronic (Africa) (Pty) Ltd v Kleynhans & another* (at 1154), that an employer has merely to show that an employee could 'easily induce' a customer to follow him to a competitor when he leaves, and that it is not necessary for it to show that the employee is able 'automatically' to carry the customer away in his pocket. Similarly, in *Medtronic (Africa) (Pty) Ltd v Van Wyk & another; Medtronic (Africa) (Pty) Ltd v Potgieter & another* (at 1165), the court found that, where there is a complex web of personal relationships between an employee and his customers, that trade connection is open to exploitation by the employee when he takes up employment with a competitor.

In *E-Merge IT Recruitment CC v Brits & another* (at 1145) the Labour Court granted an application to enforce a restraint of trade order pending an appeal by the employee. It endorsed an earlier judgment that the provisions of s 18 of the Superior Courts Act 10 of 2013, together with High Court rule 49(11), apply to the enforcement of Labour Court judgments pending appeal.

Where a former employee and the competitor for whom she worked were found to have wilfully and with mala fides breached a restraint order, the Labour Court found that incarceration of the employee and the imposition of a fine on the competitor were appropriate sanctions. It suspended the orders for the period of the restraint, finding that this would be a sufficient deterrent against further breach and would ensure strict compliance with the restraint order (*Orthocraft (Pty) Ltd t/a Advanced Hair Studios v Musindo & another* at 1192).

Transfer of Business as Going Concern

In *National Education Health & Allied Workers Union on behalf of Cornelius & others v High Rustenburg Estate (Pty) Ltd & another* (at 1183) the Labour Court had to determine, by way of a special case, whether s 197(5) of the LRA 1995 applied to an arbitration award that was reversed by the Labour Court after the transfer of the undertaking had taken place. It found that it did apply. On a correct interpretation of s 197 it could not have been intended that the review of an award binding on the old employer immediately before the transfer of its business as a going concern would have no legal

consequences for the new employer if the award was substituted on review after the transfer had taken place.

In *Senne & others v Fleet Africa (Pty) Ltd* (at 1216) the Labour Court found that the substitution of the new employer for the old employer in terms of s 197(2)(a) of the LRA 1995 did not need to occur simultaneously with the transfer of the business as a going concern. The word ‘automatically’ in the section signified nothing more than that, following the transfer of the business, the affected employees are not required to conclude new contracts of employment, not that the substitution of the employer takes place at the same time as the transfer of the business.

Dismissal — Incapacity

An employee of Armscor was dismissed after he was refused a security clearance by the SA National Defence Force. A CCMA commissioner found his dismissal to be unfair and ordered Armscor to reinstate him. On review the Labour Court confirmed that the basis for the employee’s dismissal was incapacity, and that the dismissal was fair as it resulted from a legal prohibition on employment brought about by s 37(2) of the Defence Act 42 of 2002. The court found further that, even if it was wrong, reinstatement was not appropriate in circumstances where the parties could not enforce a contract that contravened a statutory provision (*Armaments Corporation of SA (SOC) Ltd v Commission for Conciliation, Mediation & Arbitration & others* at 1127).

Dismissal — Correctional Services Employee

In *Minister of Correctional Services v Police & Prisons Civil Rights Union on behalf of Mmoledi & others* (at 1179) the Labour Court distinguished the Department of Correctional Services disciplinary code, which provides that an employee who absents himself for 30 consecutive days without authorisation may be ‘summarily dismissed’, from legislation in the public service and other institutions which provides for the ‘deemed discharge’ of an employee in similar circumstances.

Dismissal — Appropriate Remedy for Unfair Dismissal

The Labour Court found, on review in *Sibeko v Xstrata Coal SA & others* (at 1230), that, where a CCMA commissioner found that the employee’s dismissal was substantively unfair, he was not entitled to sanction the employee for his disruptive behaviour at the arbitration by denying him the primary remedy of reinstatement.

Contract of Employment — Fixed-term Contract

In *Lose and SA Post Office SOC Ltd* (at 1270) a CCMA commissioner found that, although an executive employee’s contract provided for no expectation of renewal, the employer had a long-standing practice of

renewing executives' fixed-term contracts or permitting executives to work past the expiry of their contracts. The employee's contract had been renewed in the past and his was the only five-year fixed-term contract that was not renewed. In these circumstances, the employee had proved a reasonable expectation of renewal and his dismissal on short notice was unfair.

Unfair Discrimination

In *Duma v Minister of Correctional Services & others* (at 1135) the Labour Court found that the ground of geographical location as a basis to prejudice an employee, by paying him or her less for the same work as another employee in a different location, has the ability to impair the dignity of that employee in a manner comparable to the listed grounds and amounts to discrimination. In this matter the employee met the onus of proving that the discrimination against her was unfair, and she was awarded compensation. However, in *SA Municipal Workers Union & another v Nelson Mandela Bay Municipality* (at 1203), where the employee claimed unfair discrimination on the basis that she was paid less than her male colleagues, the court found that the evidence did not demonstrate that the difference in gender was a dominant reason for the differentiation in remuneration.

Evidence — Admissibility of Unlawfully Obtained Evidence

In *Harvey v Niland & others* (at 1112) the High Court found that, although the Electronic Communications and Transactions Act 25 of 2002 created an offence of accessing data without authority, it was silent on the admissibility of such illegally obtained evidence in civil proceedings. The court found that it had a discretion to admit evidence that had been unlawfully accessed on the respondent's Facebook page, especially where it was shown that the respondent had acted in a duplicitous manner contrary to the fiduciary duties he owed to his close corporation. His duplicity had been compounded by his denial that he was acting in that manner and his undertaking not to do so. In these circumstances, the respondent could not be allowed to hide behind his expectation of privacy, and the unlawfully obtained Facebook communication was admissible.

CCMA — Commissioner's Power to Rescind Awards

In *Pikitup Johannesburg SOC Ltd v Ntombela NO & others* (at 1199) the Labour Court repeated the manner in which a commissioner is to treat a rescission application which comes before the CCMA which is late and unaccompanied by the required application for condonation — the rescission application must be struck from the roll.

Bargaining Council — Advisory Award

The employer and three trade unions, including the applicant union, UASA, entered into a three-year wage agreement. UASA elected to be bound for the first year only and declared a dispute relating to the employer's refusal to negotiate with it for the final period. The parties referred the matter for advisory arbitration where the arbitrator recommended that UASA should accept the terms of the wage settlement agreement (*United Association of SA and Hulamin (Pty) Ltd* at 1291).

Quote of the Month:

Khampepe J in *Transport & Allied Workers Union of SA v Putco Ltd* (2016) 37 *ILJ* 1091 (CC), when finding that the LRA 1995 does not permit an employer to lock out members of a trade union that was not party to a bargaining council where a dispute arose and was referred for conciliation:

‘As Conradie J observed in *Metal & Electrical Workers Union of SA [v National Panasonic Co (Parow Factory)]* 1991 (2) SA 527 (C); (1991) 12 *ILJ* 533 (C) at 536], once parties resort to industrial action they put on boxing gloves to deliver blows against each other. From the commencement of the match until the final bell has rung, there are only two boxers in the ring. There are, of course, spectators to a boxing match, but only those parties that have declared an intention to fight enter the fray. A blow cannot be dealt to a spectator simply because he or she has an interest in the outcome of the match.’