

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Jurisdiction — Labour Court

The Supreme Court of Appeal has once again, in *SA Municipal Workers Union & others v Mokgatla & others* (at 1317), confirmed that the Labour Court has exclusive jurisdiction to review the exercise of a power under s 158(1) of the LRA 1995. In this matter the court found that the High Court did not have jurisdiction to adjudicate a dispute between a trade union and its members relating to non-compliance with the union constitution. In *Association of Mineworkers & Construction Union v Verulam Sawmills (Pty) Ltd & others: In re Verulam Sawmills (Pty) Ltd v Magagula & others* (at 1325) the High Court found that it had no jurisdiction to interdict protected strike action by employees who had already been dismissed. In *Besani v Maquassi Hills Local Municipality* (at 1386) the Labour Court found that it had no jurisdiction to determine the validity or lawfulness of a resolution by a municipality terminating the contract of employment of a manager. In *Rukwaya & others v Kitchen Bar Restaurant* (at 1466) the employees relied on the incorporation of the terms of a collective agreement into their contracts of employment to approach the Labour Court in terms of s 77(3) of the Basic Conditions of Employment Act 75 of 1997. The court found that the dispute concerned minimum wages and conditions of employment negotiated and agreed at the bargaining council and was not a dispute concerning payment of what was contractually agreed to between the parties or incorporated into the employees' individual contracts by virtue of s 23(3) of the LRA 1995. The employees had to follow the special dispute-resolution procedures in the collective agreement and the enforcement procedures of s 33A of the LRA. The court had no jurisdiction to adjudicate the dispute.

Collective Agreements — Extension to Non-parties

The Labour Appeal Court has upheld the decision of the Labour Court in *Chamber of Mines of SA acting in its own name & on behalf of Harmony*

Gold Mining Co Ltd & others v Association of Mineworkers & Construction Union & others (2014) 35 ILJ 3111 (LC) on the implications of a collective agreement that has been extended to non-parties in terms of s 23 of the LRA 1995, and the constitutionality of such an agreement. It considered the distinction between collective agreements in terms of s 23 and s 32 and confirmed that the meaning of ‘workplace’ in s 23(1)(d) was clear and unambiguous. The LAC found that the legislature had chosen the principle of majoritarianism as essential for collective bargaining, labour peace and the achievement of fair labour practices, and therefore that the right of an employer and majority unions to extend collective agreements to non-parties in terms of s 23(1)(d) was constitutional and a justifiable limitation on the right to bargain collectively and to strike (*Association of Mineworkers & Construction Union & others v Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co Ltd & others* at 1333).

Dismissal — Racial Insults

In *City of Cape Town v Freddie & others* (at 1364) the Labour Appeal Court found that, where one employee had unjustifiably described a fellow employee as ‘worse than Verwoerd’, this was absolutely unacceptable in the workplace.

Dismissal — Gross Insubordination

In *City of Cape Town v Freddie & others* (at 1364) the Labour Appeal Court confirmed that insubordination that was persistent, deliberate and public, and therefore gross, normally justified dismissal. In *City of Johannesburg v Swanepoel NO & others* (at 1400) the Labour Court found that a manager’s persistent refusal to accept a transfer constituted gross insubordination when the transfer was motivated in part by the employer’s need to provide a safe working environment for the employee.

Dismissal — Breakdown in Employment Relationship

The courts have, in several matters, found that direct evidence of a breakdown in the employment relationship is not required when the breakdown can be inferred from the nature and extent of the offence. In *Woolworths (Pty) Ltd v Mabija & others* (at 1380) the Labour Appeal Court noted that in some cases the outstandingly bad conduct of the employee warranted an inference that the trust relationship had been destroyed. In *Easi Access Rental (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 1419) the Labour Court found that *Edcon Ltd v Pillemer NO & others* (2009) 30 ILJ 2642 (SCA) was not authority for the misconceived proposition that, in order to sustain its decision to dismiss an employee, an employer must always adduce direct evidence to show a breakdown in the trust relationship. This view was also expressed by the Labour Court in *Member of the Executive Council, Department of Health,*

Eastern Cape v Public Health & Social Development Sectoral Bargaining Council & others (at 1429).

Disciplinary Penalty — Plea Agreement with Accomplice

Where the employer had entered into a ‘plea agreement’ with one of several employees involved in misconduct in return for his plea of guilty and his testifying against his colleagues, the Labour Court saw no reason why such an agreement, modelled on the type recognised by s 204 of the Criminal Procedure Act 51 of 1977, should not be used in the labour law context (*Member of the Executive Council, Department of Health, Eastern Cape v Public Health & Social Development Sectoral Bargaining Council & others* at 1429).

Disciplinary Enquiry

When the SABC intended to take disciplinary action against over 100 employees arising out of massive medical aid fraud, it adopted a special disciplinary process to deal with the vast number of employees involved. In refusing an application to interdict the SABC from conducting these attenuated disciplinary hearings, the Labour Court was satisfied that, although the procedure was not the same as that provided for in the SABC disciplinary code, it ensured that discipline would be exercised fairly in accordance with the rules of natural justice (*Broadcasting Electronic Media & Allied Workers Union & others v SA Broadcasting Corporation & others* at 1394).

Prescription Act 68 of 1969

In *Compass Group SA (Pty) Ltd v Van Tonder & others* (at 1413) the Labour Court found that it was bound by the Labour Appeal Court judgment in *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* (2016) 37 ILJ 413 (LAC), and had no option but to find that the arbitration award in this matter had prescribed, thereby depriving the employee of a compensation award. Similarly, in *National Bargaining Council for the Road Freight & Logistics Industry & another and Virtual Logistics (Pty) Ltd* (at 1496) a bargaining council arbitrator found that she was bound by the decision in *Myathaza*, and ruled that an arbitration award in favour of the bargaining council had prescribed where it failed to take any of the steps required during the three-year period set out in the Prescription Act 68 of 1969.

Employee or Independent Contractor

The Labour Court found that community health workers who were contracted by the respondent health department as volunteers to fulfil deliverables in return for a stipend were clearly subject to the supervision and control of the department and met the criteria applied to determine

the existence of an employment relationship. The characterisation of the health workers as ‘service providers’ who fulfilled ‘deliverables’ for a ‘stipend’ was merely a device used to avoid the implication of employment (*Mokoena & others v Member of the Executive Council, Gauteng Department of Health* at 1445).

Reinstatement of Unfairly Dismissed Employee

In *Msikinya v General Public Service Sectoral Bargaining Council & others* (at 1457) the Labour Court was satisfied that the bargaining council arbitrator had correctly exercised her discretion when determining the extent of retrospectivity of backpay to award to the employee in terms of s 193(1)(a) of the LRA 1995. It confirmed that it was appropriate for the arbitrator to take into account any delay by the employee and his representative in finalising the arbitration.

Settlement Agreements

A bargaining council arbitrator declined to make a settlement agreement an arbitration award in terms of s 142A of the LRA 1995 where it appeared that the agreement had been signed by a person who had no legal standing to appear at arbitration proceedings (*SA Clothing & Textile Workers Union on behalf of Nxumalo and Yu Bong Clothing* at 1499). However, in *SA Clothing & Textile Workers Union on behalf of Shange & another and Wynta Designs* (at 1504) the arbitrator found that what transpired after the signature of a settlement agreement had no bearing on an application in terms of s 142A, and she made the settlement agreement an arbitration award.

CCMA Arbitration Proceedings — Access by Media

In *Lackay and SA Revenue Services* (at 1494) the CCMA commissioner granted the media access to a particular hearing before it.

National Soccer League — Disputes between Football Clubs and Players

In *Chitiyo and Royal Eagle Football Club* (at 1507) the Dispute Resolution Committee of the NSL found that its jurisdiction is akin to that of a Magistrates’ Court and that it only has the jurisdiction conferred on it by its enabling statute. In this matter it declined to exercise jurisdiction over a foreign professional football player who was not registered with the NSL and remained registered with a foreign football association.

In *Polokwane City Football Club and Mothwa & others* (at 1512) the DRC had to determine whether the football club and player were bound by two contracts signed by them a year apart. The second contract was treated as void ab initio by the parties, and the club then sought to enforce compliance with the earlier contract. The DRC found that the earlier contract had been abandoned at the time of conclusion of the second

contract and therefore that the player was no longer bound by either the first or the second contract.

Practice and Procedure

In *Seathlolo & others v Chemical Energy Paper Printing Wood & Allied Workers Union & others* (at 1485) the Labour Court found that the test to be applied in an application for leave to appeal is that referred to in s 17 of the Superior Courts Act 10 of 2013.

In *Wenum v Maquassi Hills Local Municipality & another* (at 1488) the Labour Court found that, where the applicant's attorneys had used urgent contempt of court proceedings because the respondent municipality failed to comply with a judgment for payment of money, this constituted an abuse of process and warranted a costs order de bonis propriis against the attorneys.

Quote of the Month:

Morajane C in *Lackay and SA Revenue Services* (2016) 37 ILJ 1494 (CCMA), when granting the media access to an arbitration hearing before the CCMA:

'Media is not only the lifeblood and soul of our democracy, it is the vanguard of all institutions of statutory and constitutional creation.'

The judgments considered for publication during the second quarter of the year will be summarised in the July issue of the *ILJ*.