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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Vicarious Liability

In *Erasmus v Ikwezi Municipality & another* (at 1799) the High Court restated the development and application of the principles of vicarious liability of employers for the delictual acts of their employees. In this matter, the court found that the common-law principles of vicarious liability had to be developed to hold the employer, a municipality, vicariously liable for the sexual harassment of a junior employee by a senior employee who the municipality had put in a special position of trust. That trust forged a causal link between the senior employee's position and the wrongful act.

Collective Agreements

The Labour Appeal Court, in *Health & Other Services Personnel Trade Union of SA on behalf of Tshambi v Department of Health, KwaZulu-Natal* (at 1839), considered the proper meaning of the phrase 'interpretation or application' in s 24 of the LRA 1995, and found that the words ought not to be read disjunctively — there was no need to understand s 24 in a sense so broad that any alleged breach of a term of a collective agreement meant that the dispute automatically fell within s 24. In this matter the court was satisfied that the arbitrator had misdirected himself by not determining objectively the true dispute between the parties: it was a dispute concerning an unfair labour practice under s 186(2)*(b)* and not a dispute concerning the interpretation of a collective agreement. Similarly, in *Mawethu Civils (Pty) Ltd v National Union of Mineworkers & others* (at 1851) the LAC determined the true dispute between the parties, finding that the issue in dispute was an unfair labour practice in terms of s 186(2)*(a)* relating to benefits. The issue in dispute was one that the employees had the right to refer to arbitration and any strike by the employees was unprotected.

In *G4S Cash Solutions SA (Pty) Ltd v Motor Transport Workers Union of SA & others* (at 1832) the Labour Appeal Court found that mere reference to the provisions of a collective agreement to clarify the terms of a contract of employment relied on by employees did not convert their dispute from one sourced in the individual contract to one relating to the interpretation or application of a collective agreement under s 24.

In *Democratic Nursing Organisation of SA on behalf of Du Toit & another v Western Cape Department of Health & others* (at 1819) the Labour Appeal Court confirmed the well-established approach to the proper interpretation of documents, and found that the arbitrator had not erred when he interpreted an occupation specific dispensation collective agreement by reading it together with further documents.

Strike — Withholding of Labour

In *G4S Cash Solutions SA (Pty) Ltd v Motor Transport Workers Union of SA & others* (at 1832) the Labour Appeal Court found that employees who withheld labour that they were not obliged to perform in terms of their contracts of employment were not participating in an unprotected strike. Similarly, in *Imperial Cargo Solutions (Pty) Ltd v SA Transport & Allied Workers Union & others* (at 1908) the Labour Court found that, where employees withheld the labour that they had been obliged to perform in terms of a cancelled collective agreement, the withholding of labour did not constitute an unprotected strike.

Jurisdiction — Labour Court

In *Merafong City Local Municipality v SA Municipal Workers Union & another* (at 1857) the Labour Appeal Court noted that, although the concept of the jurisdiction of the Labour Court is apparently dealt with in s 157 of the LRA 1995 and the concept of its powers in s 158, a proper reading of s 157 makes it clear that other provisions of the LRA are sources of jurisdiction of the Labour Court, including s 158(1)*(h)*.

In *Petersen v Meltrade 123 CC t/a Silvertree Restaurant & another* (at 1932) the Labour Court found that it has jurisdiction to issue a garnishee order against a judgment debtor; however, the judgment creditor must obtain a writ of execution before seeking an order of attachment against the garnishee.

Unfair Discrimination — Religious Belief

In *Mbele and Fidelity Security Services Ltd* (at 1935) a CCMA commissioner extensively surveyed the cases on the protection of religious and cultural freedom in determining whether a workplace rule requiring employees of a security company to be clean-shaven constituted a justifiable limitation on its employees' right to religious freedom. The commissioner was satisfied that the employer failed to prove that the limitation was justified and held that the applicant security guard, a member of the Shembe Church, had been unfairly discriminated against in terms of the Employment Equity Act 55 of 1998.

Legal Standing — Review of Appointment of Municipal Manager

The Labour Appeal Court, in *Merafong City Local Municipality v SA Municipal Workers Union & another* (at 1857), considered both the commonlaw approach to locus standi in public law matters and the less formalistic approach that has been adopted by the Constitutional Court, and noted that the question whether a party has a sufficient interest in a matter has to be left to the discretion of the court taking into account all relevant factors and circumstances. In this matter, where a trade union and employee/ ratepayer of a municipality sought to review and set aside the appointment of a municipal manager in terms of s 54A of the Local Government: Municipal Systems Act 32 of 2000, the LAC found that the applicants had not exhausted the internal remedies provided in s 54A. Section 54A(9) empowers the minister responsible for local government to ensure that a suitable candidate is appointed as municipal manager; and the failure to seek his intervention or to join him in the proceedings was crucial to the applicants' standing.

Basic Conditions of Employment Act 75 of 1997

In *Zapop (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 1882) the Labour Appeal Court confirmed that s 74(2) of the BCEA envisages that the Labour Court or arbitrator hearing an unfair dismissal claim may also determine a claim for commission where the commission in question forms part of the dismissed employee's remuneration. On a purposive interpretation of s 32, the amount due must be paid within seven days of the date on which it becomes due, even if that date falls after the date of dismissal. The court also found that, where the parties have agreed to the amount owing to the employee, the method of calculation set out in s 35(4) is not applicable.

Reinstatement

In *Ramsamy and Department of Public Works* (at 1960) a bargaining council arbitrator, having found in 2012 that the employee's dismissal in 2001 had been unfair, finally in 2015 ordered the department to reinstate him. The arbitrator found that the delays in finalising the matter were not caused solely by the employee and that the department had always been aware that the employee insisted on reinstatement. In determining retrospectivity of the award, the arbitrator ordered reinstatement with backpay from the employee's date of dismissal to the date on which he found alternative employment.

Review of Arbitration Awards — Peremption

In *Bidair Services (Pty) Ltd v Mbhele NO & others* (at 1894) the Labour Court found that, where a party has expressly and unequivocally acquiesced in an arbitration award, it is bound by its election and cannot challenge the award even if it is later varied by the arbitrator. However, the affected party does not lose its right to challenge the variation ruling.

CCMA — Enquiry by Arbitrator

The Labour Court declined to grant urgent applications to postpone disciplinary enquiries pending the resolution of unfair labour practice disputes, finding, inter alia, that the LRA 1995 now provides an alternative remedy in cases involving claims of a protected disclosure. It noted that s 188A(11) has recently been enacted to provide a procedure to avoid extensive collateral litigation in disputes arising from protected disclosures made in terms of the Protected Disclosures Act 26 of 2000. The section provides that, if an employee alleges in good faith that the holding of a disciplinary enquiry contravenes the PDA, either the employee or the employer may insist that an enquiry into the employee's conduct or capacity be conducted by an arbitrator appointed by the CCMA or a bargaining council. The court, therefore, found that the applicants ought to have invoked the provisions of s 188A(11), and were not entitled to the urgent relief they sought (*Letsoalo & another v Minister of Police & others; Sesing v Minister of Police & others* at 1916).

Pre-dismissal Arbitration

In *Mchuba v Passenger Rail Agency of SA* (at 1923) the Labour Court found that, where an employer has elected to deal with allegations of misconduct against an employee by means of the s 188A pre-dismissal arbitration process as stipulated in the employee's contract of employment, the employer cannot later abandon that process unilaterally and conduct a disciplinary hearing.

Costs — Costs de Bonis Propriis

A bargaining council arbitrator awarded costs de bonis propriis against a trade union official who had attempted to continue to represent a member after he had left the trade union and concealed this information from the member, the employer and the arbitrator (*Media Workers Association of SA on behalf of Reddy and Shave & Gibson* at 1954).

Quote of the Month:

Not awarded.