

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Affirmative Action and Unfair Discrimination

The Constitutional Court held, in *Solidarity & others v Department of Correctional Services & others (Police & Prisons Civil Rights Union & another as Amici Curiae)* (at 1995), that the application of the *Barnard* principle, ie the principle that a designated employer may refuse to appoint a candidate who falls within a category of persons who are already adequately represented at a particular occupation level, is not limited to white candidates. Black candidates, whether they are Africans, coloureds or Indians, are subject to the principle. Both men and women are also subject to the principle. The court confirmed that a quota was rigid whereas numerical targets were flexible and that an employment equity plan which provided for deviations from numerical targets met the requirements of the Employment Equity Act 55 of 1998. It found that the Department of Correctional Services employment equity plan failed to comply with the mandatory requirement of s 42(a) of the EEA that both national and regional demographics had to be considered, and that this rendered the plan unlawful.

In *Solidarity on behalf of Pretorius v City of Tshwane Metropolitan Municipality & another* (at 2144) the Labour Court had to determine whether a staffing policy of the Tshwane municipality qualified as an employment equity plan as contemplated in the EEA read with s 9(2) of the Constitution 1996. The policy did not provide, amongst others, for targets, numerical goals or objectives that could be monitored and measured; had no provision setting out the circumstances in which deviations from the policy would be accepted; and did not have regard to numerical goals set according to both the national and regional demographics as required by s 42(a) of the EEA. This led the court to conclude that the staffing policy did not constitute an affirmative action measure as contemplated in the EEA.

Retrenchment — Consultation

In *Association of Mineworkers & Construction Union & others v Buffalo Coal Dundee (Pty) Ltd & another* (at 2035) the Labour Appeal Court found that, on the correction interpretation of s 52(4) of the Mineral and Petroleum Resources Development Act 28 of 2002, a mining right holder remains responsible for the implementation of a retrenchment process, even where it is not also the employer of the employees to be retrenched.

Collective Agreements

In *Botselo Holdings (Pty) Ltd v National Transport Movement & others* (at 2059) the Labour Court found that, when a wage demand is made before a recognition agreement is entered into between the employer and the union, the agreement applies to all current and future wage demands in the absence of a provision ring fencing the pending wage demands from the preconditions for collective bargaining set out in the agreement.

In *SA Airways SOC Ltd & another v National Transport Movement & others* (at 2128) the Labour Court granted an order declaring that collective agreements entered into between the employer and one faction of a trade union claiming to act on behalf of the union to be valid and binding. It found that the disputed agreements were valid until such time as they were terminated or cancelled or declared to be invalid and unenforceable by a court.

Strike — Unprotected Strike

In *Mbele & others v Chainpack (Pty) Ltd & others* (at 2107) the employees were dismissed after they refused to work because they had a grievance with their own union. The Labour Court confirmed that the strike was unprotected and found that the ultimatum issued by the employer had been clear and unambiguous and had met the requirements of both item 6 and item 7 of the Code of Good Practice: Dismissal. The dismissal of the employees was found to be fair.

Trade Union — Dispute between Factions within Union

In *SA Airways SOC Ltd & another v National Transport Movement & others* (at 2128) the Labour Court recognised the difficult position that the employer found itself in where its duty to bargain collectively was rendered unmanageable by a power struggle between two factions within a union. It cautioned against the employer taking sides and giving preference to one faction. It also expressed its concern for the ordinary members of the union and called upon the employer or the union members to approach the Registrar of Labour Relations to seek the winding-up or the cancellation of the registration of the union.

Dismissal — Derivative Misconduct

The Labour Court found that, where it can be inferred from the evidence that certain employees were present while acts of misconduct were being perpetrated during a protected strike, those employees cannot simply remain silent. They are bound by a duty of good faith towards the employer, and are obliged to come forward and exonerate themselves or provide the names of the perpetrators of the misconduct. Their failure to do so amounts to derivative misconduct (*Dunlop Mixing & Technical Services (Pty) Ltd & others v National Union of Metalworkers of SA on behalf of Khanyile & others* at 2065).

Dismissal — Supervening Impossibility of Performance

The employer service provider dismissed the employee when the employer's client withdrew the employee's access permit thereby preventing her from tendering her services at the client's premises. A CCMA commissioner found that the employee's dismissal was for incapacity due to supervening impossibility of performance. The employer had to comply with the guidelines set out in items 8 and 10 of the Code of Good Practice: Dismissal. It had not done so, and the employee's dismissal was unfair (*SA Private Security Workers Union on behalf of Nomavila and Bosasa Operations (Pty) Ltd* at 2172).

Employee's Right to Privacy versus Employer's Right to Confidentiality

The employee took photos of his employer's products and production processes on his personal cellphone. He was not authorised to do so, and, when he refused to obey an instruction remove the photos from his phone and permit the employer to verify this, he was dismissed. A CCMA arbitrator found that the instruction had been reasonable and upheld the dismissal. On review, the employee contended that the employer had violated his right to privacy in terms of s 14 of the Constitution 1996. The Labour Court found that the employee's right to privacy had to be weighed against the employer's right to preserve the confidentiality of its business information. The employee's right to preserve the confidentiality of his personal data on his cellphone did not entitle him to retain data about the employer which he obtained without permission which was stored on the same device (*National Union of Metalworkers of SA & another v Rafee NO & others* at 2122).

Employee — Probationary Employee

In *IBM SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 2099) the Labour Court confirmed that an employer is not expected to treat a probationary employee appointed to a responsible position in the same manner as it treats a junior employee in training who requires constant direction and coaching. The court found that the employer has the right to 'test' the employee in different situations and to determine whether she is capable of coping with the rigours of permanent employment. If a probationary employee is found to be wanting on key aspects, the employer is at liberty to follow its instincts and not appoint the employee permanently. These important but often intangible considerations are inherent in the context of 'less compelling' reasons mentioned in item 8(1) of the Code of Good Practice: Dismissal.

Evidence — Documentary Evidence

In *Hillside Aluminium (Pty) Ltd v Mathuse & others* (at 2082) the Labour Court considered the status of documents included in a trial bundle. It found that, when the parties at arbitration proceedings have agreed that the disciplinary record is what it purports to be and is a true reflection of what transpired at the disciplinary hearing, the arbitrator is not mero motu entitled to rely on portions of the record which are not introduced as evidence by way of testimony. Even if the arbitrator is entitled to do so, he or she must alert the parties to his or her intention to consider the disciplinary record and afford them the opportunity to be heard.

Representation at Arbitration Proceedings

In *Erasmus and Fidelity Security Services (Pty) Ltd* (at 2168) the CCMA commissioner prohibited an unregistered trade union from representing an employee. He found that it was irrelevant that the union was appealing the Registrar of Labour Relations' decision not to register the union and, until that decision was overturned, the union remained unregistered and lacked the necessary locus standi to appear at the CCMA.

When it came to light during closing argument that the employer's representative was a labour relations consultant who was not permitted to represent the employer in arbitration proceedings, the bargaining council arbitrator excluded the heads of argument drawn up by the consultant (*Rassool and CK Travel & Tour* at 2190).

Practice and Procedure

The Labour Appeal Court explained the difference between a subpoena duces tecum and a request for discovery, noting that the purpose of the latter is to obtain documentation which is in the possession or under the control of a party to the proceedings, while the former is the method ordinarily employed to secure the production of documentation that is in the possession of a non-party (*Mogwele Waste (Pty) Ltd v Brynard* at 2051). The Labour Court found that there was no reason why rule 6(12)(c) of the High Court Rules should not be adopted by the Labour Court. The rule allows for the expeditious rescission of an order granted on an urgent basis to avoid the party against whom it was made from having to bring a rescission application on motion (*SA Post Office SOC Ltd v Commission for Conciliation, Mediation & Arbitration & others* at 2140).

A bargaining council arbitrator declined an application for rescission of a costs order purportedly brought in terms of s 144(b) of the LRA 1995. The commissioner found that the applicant was not seeking to correct a clerical, arithmetical or other error in the ruling, but rather to alter the substance or sense of the ruling (*Media Workers Association of SA on behalf of Reddy and Shave & Gibson* at 2179). Similarly, in *Meondo Trading 369 CC and Bargaining Council for the Contract Cleaning Industry KZN* (at 2186), an arbitrator declined an application to rescind a ruling refusing rescission. She found that an arbitrator is not empowered to rescind his or her own rulings or revisit those rulings once granted.

Quote of the Month:

Nugent AJ in *Solidarity & others v Department of Correctional Services & others (Police & Prisons Civil Rights Union & another as Amici Curiae)* (2016) 37 ILJ 1995 (CC):

‘The passages from judgments of this court I referred to all recognise that reconciling the redress the Constitution demands with the constitutional protection afforded the dignity of others is profoundly difficult. That goal is capable of being achieved only by a visionary and textured employment equity plan that incorporates mechanisms enabling thoughtful balance to be brought to a range of interests. It is only in that way that the constitutional tensions referred to in *Barnard* are harmonised. And it is in that way that the Constitution’s demand for a public service that is “broadly representative of the South African people” will be realised. Ours are a vibrantly diversified people. It does the cause of transformation no good to render them as ciphers reflected in an arid ratio having no normative content.’