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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Strikes — Protected and Unprotected Strikes

The Constitutional Court held, in *Transport & Allied Workers Union of SA on behalf of Ngedle & others v Unitrans Fuel & Chemical (Pty) Ltd* (at 2485), that the employer's offer to comply with the striking employees' demand as 'a gesture of goodwill' and to end the strike, did not constitute compliance with the demand. The employer was required to restore certain employees' contractually agreed wage rate and actually pay them overdue backpay before calling upon the striking employees to return to work and the employees were entitled to withhold their labour until the employer complied fully and unconditionally with their demand. The court also found that, even if the strike had become unprotected after the employer had made its promise, the strike had been protected for most of its duration and only became unprotected for a short period. The dismissal of the employees was therefore predominantly automatically unfair and the employees were entitled to reinstatement.

In *Mndebele & others v Xstrata SA (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)* (at 2610) the employees had refused an instruction to attend a wellness function and, after being given an ultimatum, were dismissed. On appeal from a decision that the strike was unprotected and the dismissal fair, the Labour Appeal Court found that, although the strike was of short duration and had no economic impact, it undermined the authority and prerogative of the employer in achieving its social responsibility to its employees. It therefore confirmed that the strike was unprotected and that the dismissal was substantively and procedurally fair.

Transfer of Business as Going Concern

In *Kruger & others v Aciel Geomatics (Pty) Ltd* (at 2567) the Labour Appeal Court confirmed that the cancellation of a non-exclusive distribution agreement and the appointment of a new distributor did not constitute the transfer of a business as a going concern for the purposes of s 197 of the LRA 1995.

In *Temba Big Save CC v Kunyuza & others* (at 2633) the Labour Appeal Court confirmed that where a s 197 transfer is in play there is no need to refer both the old and the new employer to conciliation in an unfair dismissal dispute — any one of them will suffice because, in terms of s 197 of the LRA 1995, the new employer takes the place of the old employer in all material respects, including but not limited to contracts of employment and any pending litigation.

In *Mokhele & others v Schmidt NO & others* (at 2662) the Labour Court found that the employer had attempted to circumvent the provisions of s 197A(2)*(a)* of the LRA 1995 by dismissing the employees shortly before the winding-up of the old employer. It found further that the purchase of the assets of the old employer was a deliberate and contrived attempt to avoid the consequences of transfer, and that the business had in fact been transferred as a going concern. The dismissals of the employees were therefore automatically unfair and the new employer was ordered to reinstate them with retrospective effect.

Labour Court — Jurisdiction

Where an employer sought an order for repayment of funds illegally distributed by the sheriff, the Labour Appeal Court confirmed that the Labour Court had no jurisdiction to adjudicate delictual or enrichment claims arising out of the illegal conduct of the sheriff. It therefore upheld the Labour Court's ruling that it lacked jurisdiction to grant the remedy sought by the employer (*Windybrow Theatre v Maphela & others* at 2641).

CCMA — Jurisdiction

The employees referred a dispute relating to equal pay for work of equal value to the CCMA. The commissioner first determined the true nature of the dispute to satisfy herself that the CCMA had jurisdiction. She found that the dispute was in fact a grading dispute and not one in respect of which the CCMA had jurisdiction (*Buthelezi & others and Greystones Cargo Systems (Pty) Ltd* at 2671).

In arbitration proceedings before the CCMA it became apparent that the dispute ought to have been referred to private arbitration and the employee argued that, in terms of s 147(5)*(a)* of the LRA 1995, the CCMA should exercise its discretion to assume jurisdiction. The commissioner found herself bound by Labour Appeal Court authority to the effect that the CCMA, not its delegate or the commissioner hearing the matter, had to make the decision whether or not to assume jurisdiction. The commissioner therefore referred the matter to the CCMA management to decide whether to assume jurisdiction (*Minter-Brown and Kagiso Media t/a East Coast Radio* at 2676). Similarly, in *Msomi & others and Centremark Roadmarking (Pty) Ltd* (at 2687) the CCMA commissioner refused to assume jurisdiction where it was clear that the dispute ought to have been referred to the accredited bargaining council. And in *Quarrie and Shell & BP SA Petroleum Refineries (Pty) Ltd & another* (at 2690) the CCMA assumed jurisdiction in terms of s 51(4) where two employers belonging to two different bargaining councils were cited by the employee.

Bargaining Council — Jurisdiction

A union referred a refusal to bargain dispute to the bargaining council. In conciliation proceedings, the conciliator was satisfied that he was not precluded from issuing an advisory award in terms of s 135(5)*(c)* of the LRA 1995, and proceeded to do so (*Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Members and Prime Furniture Manufacturers (Pty) Ltd* at 2701).

Where employees referred a dispute to the bargaining council alleging that their employer had committed an unfair labour practice in terms of s 186(2)*(a)* of the LRA 1995 by refusing to pay them for a certain period, the conciliator found that the real dispute related to remuneration and did not constitute an unfair labour practice. She found therefore that the bargaining council lacked jurisdiction to entertain the dispute (*National Union of Metalworkers of SA on behalf of Members and Tropic Plastics & Packaging Industry (Pty) Ltd* at 2705).

Arbitration Awards — Requirements for Valid Awards

The Labour Appeal Court has found that the requirement in s 138(7)*(a)* of the LRA 1995 that an arbitration award must be signed by the arbitrator is not peremptory — the award is final once it is conveyed to the parties and passed into the public domain (*Solidarity on behalf of Smook v Department of Transport, Roads & Public Works* at 2626).

Arbitration Proceedings — Representation

In *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers & Construction Union & others* (at 2593) the Labour Appeal Court confirmed the right of an individual employee who is a party to a dismissal dispute to choose his or her representative. It found that an employer has no locus standi to interfere in the internal decisions of a union on any aspect of the relationship between the union and its members, and that, in this matter, the employer had no authority to question the union membership status of its employees.

Settlement Agreement — Interpretation

A settlement agreement provided for the reinstatement of dismissed employees and provided further that the arbitrator was to determine the backpay to be awarded to the reinstated workers, those who chose not to be reinstated and the estates of deceased workers. The arbitrator awarded backpay to the date of dismissal. On review of the award, the Labour Court was satisfied that, properly construed, the settlement agreement gave the arbitrator the power to determine backpay for the period between the date of dismissal of the employees and the date of their reinstatement (*Genrec Engineering (Pty) Ltd v Metal & Engineering Industries Bargaining Council & others* at 2649).

Dismissal

The employee had been employed and dismissed by a subcontractor but, after settling his unfair dismissal claim with the employer, he pursued a claim for reinstatement against the client, alleging that he had been dismissed at the client's behest. The CCMA commissioner found that there was no basis in fact or in law for his claim against the client (*Quarrie and Shell & BP SA Petroleum Refineries (Pty) Ltd & another* at 2690).

Practice and Procedure

The Labour Appeal Court upheld a Labour Court decision to dismiss a review application because the appellant had provided an incomplete record of the arbitration proceedings. As the appellant had challenged the factual findings of the arbitrator, the court had to see all the evidence that was before the arbitrator to enable it to deal fully and fairly with the review. The missing parts of the record, being the testimonies of several witnesses, were material and the appellant had not taken reasonable steps to locate the missing parts or to reconstruct the record (*Francis Baard District Municipality v Rex NO & others* at 2560).

Where an employee had proceeded by way of motion proceedings against her employer in a claim for damages for breach of contract, the Labour Appeal Court found that, applying the *Plascon-Evans* rule, the employee had failed to discharge the onus of proving her case and the Labour Court ought therefore to have dismissed the application. It found that, although the court has a discretion to refer a dispute of fact for oral evidence, it should not do so where an applicant totally disregards the principle that, where factual disputes are anticipated, the matter should be instituted by way of action (*KwaZulu-Natal Tourism Authority & others v Wasa* at 2581).

In *Mndebele & others v Xstrata SA (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)* (at 2610) and *Solidarity on behalf of Smook v Department of Transport, Roads & Public Works* (at 2626) the Labour Appeal Court dealt with applications for condonation of the late filing of the appeal record. In both matters the court first examined the prospects of success, pointing out that, if there were no prospects of success, there would be no point in granting condonation and the appeals had to fail.

The purpose of the notice of objection referred to in clause 11.4.2 of the Labour Court Practice Manual is to inform the offending party and the court that the objecting party is not prepared to accept the late delivery of papers by the offending party. The Labour Appeal Court found, therefore, that the notice of objection does not have to be a formal notice; it is sufficient for the objection party to raise its objection in its replying papers (*Temba Big Save CC v Kunyuza & others* at 2633).

Quote of the Month:

Sutherland AJA in *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers & Construction Union & others* (2016) 37 *ILJ* 2593 (LAC), when commenting on the employer's challenge to the right of its dismissed employees to demand in dismissal proceedings before an arbitration forum to be represented by a union of their choice:

'Bluntly, what business is it of an employer, in such circumstances, to concern itself with whether membership dues are up to date or any other aspect of the relationship between individual employees and their union? In my view, there is no basis at all. ... On the facts of this case, the individuals claimed to be members and the union claimed them as members. Assuming that the employer's challenge that the individuals were not in good standing were to be true, surely the choice of the union to elect not to cancel the membership or enforce specific performance is one which it can make without regard to any third party? ... Moreover, except as regards the need for a union to prove membership for collective bargaining purposes, the relationship between a union and its members is a private matter. To interfere with the private contractual relationship of other persons, a stranger would have to demonstrate some sort of delictual harm. None exists to justify the appellant seeking to pierce the veil of AMCU's internal affairs in relation to the dismissal dispute. ... The appellant's legitimate interest in the validity of membership for another purpose, relating to it incurring an obligation to accord AMCU a representative status, is quite distinct from any legitimate concerns it might conceivably have in relation to arbitration proceedings about misconduct.'