

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Contract of Employment — Separation Agreement

After it came to the employer's attention that a senior management employee had made certain misrepresentations to it when he was interviewed for employment, the parties entered into a separation agreement which included a clause limiting the employee's right to seek judicial redress in the CCMA and the courts. Both the Labour Court and the Labour Appeal Court found that the separation agreement was not invalid. The Constitutional Court dismissed the employee's application for leave to appeal to it. It found that the public and the courts have a powerful interest in enforcing agreements of this sort. The employee had to be held bound. When parties settle an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously and willingly embraced. This was particularly so if the agreement was for the benefit of the party seeking to escape the consequences of his own conduct (*GbengaOluwatoye v Reckitt Benckiser SA (Pty) Ltd & another* at 2723).

Contract of Employment — Reasonable Expectation of Renewal

In *Klusener and KZN Cricket (Pty) Ltd* (at 2916) a professional cricket coach's contract had not been renewed at a time when the team was performing poorly. A CCMA commissioner found that the coach had no reasonable expectation of renewal at the time when he was informed that the contract was not going to be renewed or when it expired — he could not rely on an assurance given by the CEO some months before the expiry of the contract.

Emoluments Attachment Orders

The High Court found, inter alia, that the provisions of s 65J(2) of the Magistrates' Courts Act 32 of 1944, to the extent that they authorised the issue of emoluments attachment orders without judicial oversight, were inconsistent with the Constitution and invalid. In an application to the Constitutional Court for confirmation of the order of invalidity, the court, in two majority judgments, agreed with the High Court's finding that s 65J(2) does not provide for judicial oversight over the issue of EAOs. However, it did not confirm the High Court's declaration of invalidity, proposing instead a remedy which combined a reading-in and severance of certain parts of s 65J(2)(a)-(b) to remedy the constitutional defects in the section (*University of Stellenbosch Legal Aid Clinic & others v Minister of Justice & Correctional Services & others (SA Human Rights Commission as Amicus Curiae); Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic & others; Mavava Trading 279 (Pty) Ltd & others v University of Stellenbosch Legal Aid Clinic & others* at 2730).

CCMA — Jurisdiction

In *Motsomotso v Mogale City Local Municipality* (at 2803) the Labour Appeal Court found that the CCMA is the only dispute-resolution forum that has jurisdiction to conciliate an unfair discrimination dispute in terms of the Employment Equity Act 55 of 1998.

In *Famous Brands Management Co (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 2857) the Labour Court found that the CCMA had jurisdiction, in terms of s 10(6)(aA) of the EEA, to consider an unfair discrimination claim relating to equal pay for work of equal value referred by more than one employee.

CCMA Arbitration Awards — Enforcement

The Labour Appeal Court noted, in *Commission for Conciliation, Mediation & Arbitration v MBS Transport CC & others; Commission for Conciliation, Mediation & Arbitration v Bheka Management Services (Pty) Ltd & others* (at 2793), that s 143(1) of the LRA 1995, following the 2014 amendments, now provides that an arbitration award may be enforced 'as if it were an order of the Labour Court in respect of which a writ has been issued'. The procedure created by s 143 makes it easier, inexpensive, effective and accessible for a person to enforce a certified arbitration award. On the proper meaning of the words used in s 143, the court found that, by using the words 'as if it were' the legislature created a legal fiction. Therefore, s 143(1) read with s 143(3) means that, when an arbitration award is certified by the Director of the CCMA, it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued. The practical effect of s 143(1) and s 143(3) is that a certified arbitration award may be enforced without the need for a writ to be issued by any court or the CCMA.

Bargaining Council — Exclusive Collective Bargaining Forum

In *Plastics Convertors Association of SA on behalf of Members v National Union of Metalworkers of SA & others* (at 2815) the Labour Appeal Court found that the Plastics Negotiating Forum had been created as the exclusive forum mandated by the Metal & Engineering Industries Bargaining Council to negotiate terms and conditions for parties within the plastics sector.

Dismissal — Breach of Disciplinary Rule

The Labour Appeal Court found, in *Woolworths (Pty) Ltd v SA Commercial Catering & Allied Workers Union & others* (at 2831), that, where a company rule provided that till shortages or excesses of over R500 attracted the sanction of dismissal for a first offence, it was not necessary for the employer to prove that the employee had been dishonest or that any warnings had been given to her for previous till discrepancies.

Dismissal — Constructive Dismissal

In *Wilcox and Nicola Wilcox & Associates Optometrists Inc t/a Classic Eyes* (at 2930) a CCMA commissioner found that the employee — the husband of one of the directors and shareholders of the employer business — was a casualty of an ongoing conflict between the directors and shareholders, and this rendered his continued employment intolerable. The employee had, therefore, discharged the onus of proving that he was dismissed and that the dismissal was substantively and procedurally unfair. He was awarded compensation.

Unfair Discrimination — Equal Pay for Work of Equal Value

A collective agreement provided that all newly appointed employees were to be paid at 80% of the rate paid to the employer's longer serving employees during their first two years of service. A CCMA arbitrator found that this amounted to unfair discrimination. In an appeal to the Labour Court in terms of s 10(8) of the Employment Equity Act 55 of 1998, the court found, inter alia, that pay differentiation on the basis of length of service was not irrational and not unfair discrimination on an arbitrary ground (*Pioneer Foods (Pty) Ltd v Workers Against Regression & others* (at 2872)).

Practice and Procedure

The Labour Appeal Court found that, where the facts clearly showed that the employer party had not abandoned its defence of a dismissal dispute before the CCMA, it could not be said to be in wilful default and the CCMA arbitration proceedings should not have continued in its absence. The CCMA should therefore have granted its application to rescind the award handed down by the arbitrating commissioner (*Pack 'n Stack v Khawula NO & others* at 2807). The Labour Court, in *Department of Correctional Services v Baloyi* (at 2852), granted an application rescinding an order making a CCMA award an order of court on the basis that the order was erroneously granted. It appeared that the judge who made the order in chambers was not aware that the department was opposing the matter because the notice of opposition was not in the court file.

Several urgent applications came before the Labour Court in which it considered the principles relating to urgency. In *Solidarity & others v SA Broadcasting Corporation* (at 2888) the court found that the SABC had unlawfully terminated the applicant journalists' contracts of employment and, although generally dismissal in breach of a contract of employment might not warrant urgent relief, several special considerations in this matter meant it was urgent. In *Association of Mineworkers & Construction Union & others v Northam Platinum Ltd & another* (at 2840) the court reiterated that financial hardship on its own does not establish a basis for urgency. In *National Union of Metalworkers of SA & others v Bumatech Calcium Aluminates* (at 2862) the court found that where a previous application concerning the same dispute had earlier been struck off the roll for want of urgency and no new facts were alleged, the matter was not urgent, and the defence of *lis alibi pendens* was upheld.

Quote of the Month:

Steenkamp J in *Pioneer Foods (Pty) Ltd v Workers Against Regression & others* (2016) 37 ILJ 2872 (LC), when commenting on an arbitration award in which a CCMA commissioner found that it amounted to unfair discrimination for an employer to pay newly appointed employees at a lower rate than existing long-service employees in terms of a collective agreement:

‘The arbitrator’s award, if correct, has the startling implication that it is impermissible in terms of the EEA for a South African employer to give effect to a collective agreement which prescribes differential rates for employees with different periods of service with it. The award is simply wrong in this regard, and giving effect to such agreements does not constitute “discrimination” on an unlisted “arbitrary ground”, much less “unfair” discrimination. ... Differential treatment is ubiquitous in modern life and in the workplace. The EEA does not regulate such differential treatment at all unless and until it is established that it is both “not rational” and constitutes “discrimination”.’