

# HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

## Reinstatement

In *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* (at 97) the employer conceded that the SARS Commissioner had not been allowed to substitute the disciplinary chairperson's sanction and it did not challenge the CCMA commissioner's finding that the dismissal of the employee had been unfair, but it argued that the CCMA commissioner's order of reinstatement was unreasonable because the employee, who had called his superior a 'kaffir', was guilty of racism and because his continued employment would be intolerable. The Constitutional Court agreed with SARS. It found that the CCMA commissioner had failed to consider the provisions of s 193(2) of the LRA 1995 and key factors relevant to a decision whether to reinstate. Having noted that the use of the word 'kaffir' is 'the worst of all racial vitriols a white person can ever direct at an African in this country', the court found that it was not necessary for SARS to explain how that extremely abusive language could break the trust relationship and render the employment relationship intolerable — where such injurious disregard for human dignity and racial hatred is spewed by an employee against his colleagues in a workplace, that ordinarily renders the relationship between the employee and the employer intolerable. The court found further that, as an organ of state, SARS played a special role in the fight against and the eradication of racism in the workplace and in society. The court was therefore satisfied that no reasonable arbitrator could have ordered reinstatement, and ordered instead that the employee be awarded compensation equivalent to six months' salary for his unfair dismissal.

## Dismissal — Insubordination

Where two employees, both shop stewards, had locked the gates to the employer's premises and refused to comply with a reasonable instruction to open the gates, the Labour Appeal Court confirmed that this amounted to gross insubordination as the employees had deliberately and maliciously defied a lawful and reasonable instruction. Their dismissal was upheld (*SA Municipal Workers Union & others v eThekweni Municipality & others* at 158). Similarly, where an employee who lost his position as full-time health and safety shop steward refused to return to his work position despite repeated instructions from the employer to do so, the Labour Court found that the employee's deliberate continued refusal to comply with the instructions amounted to gross insubordination. His dismissal was upheld (*Glencore Operations SA (Pty) Ltd (Lion Ferrochrome) v National Union of Mineworkers on behalf of Maripane & others* at 181).

## Dismissal — Unprotected Strike

In *National Union of Mineworkers & others v Power Construction (Pty) Ltd* (at 227) the Labour Court found that employees who refused to work, first, because of 'inclement weather', and later, because they were not paid for the time not worked were on an unprotected strike and that their dismissal was both substantively and procedurally fair. The court referred to a statement made by the union representative that the employees were not striking as they were 'not damaging people's property, ... holding sticks and stuff like that'. The court commented that the statement was indicative of how the union approached the matter — because the strike was not violent, it deemed dismissal to be too harsh a sanction. The court noted that it was shocking that a trade union organiser with years of experience equated a strike to wilful damage to property.

## Disciplinary Penalty — Interference with Penalty Handed Down by Chairperson

The Labour Court has found, in *Minister of Justice & Constitutional Development v General Public Service Sectoral Bargaining Council & others* (at 213), that the Public Service Act (Proc 103 of 1994) and the public service disciplinary code give the chairperson of a disciplinary hearing the power to make a final decision on the sanction to impose on an employee. The employer, therefore, has no power to interfere in the sanction imposed by the chairperson. In this matter the employee and the employer's representative entered into a plea agreement which the disciplinary chairperson gave effect to. Thereafter the employer changed the sanction of suspension for three months without pay to dismissal. The court found that there was no reason to interfere with the bargaining council arbitrator's finding that the substitution of the sanction was unlawful and invalid.

In *Central University of Technology v Kholoane & others* (at 167), the bargaining council arbitrator found that the university could change the sanction imposed by the disciplinary chairperson, but that the alteration of the sanction from a final written warning to dismissal was unfair. The Labour Court agreed with the arbitrator. It found that, where the employer has a discretion to change the sanction imposed by a disciplinary chairperson, this discretion is not unfettered — it is a tool to correct a sanction where the sanction imposed by the disciplinary chairperson is wholly or shockingly inappropriate. In this matter, where the sanction imposed by the disciplinary chairperson was listed as an alternative to dismissal, it could not be viewed as inappropriate.

In *Opperman v Commission for Conciliation, Mediation & Arbitration & others* (at 242), where the sanction of a final written warning imposed by the disciplinary chairperson was changed on appeal to dismissal, the Labour Court confirmed that an appeal chairperson can only increase the sanction where he or she is empowered to do so in terms of the disciplinary code. The court found further that even if he or she has such power, the appeal chairperson must adhere to the *audi alteram partem* principle and give the employee the opportunity to make submissions why a harsher penalty should not be imposed.

In *Moshoeshoe and Neotel (Pty) Ltd* (at 252) the employer had also changed the penalty of a final written warning imposed by the disciplinary chairperson to dismissal. The CCMA commissioner found that the chairperson had final decision-making authority in terms of the disciplinary code, and the employer was not entitled to substitute the sanction. The commissioner, however, rejected the employee's application for a declaratory order that the employer's conduct was invalid and unlawful. He found that, as the LRA 1995 did not contemplate invalid or unlawful dismissals, the CCMA had no power to grant such an order or to grant reinstatement.

### Shop Stewards — Status

In *SA Municipal Workers Union & others v eThekweni Municipality & others* (at 158) the Labour Appeal Court observed that shop stewards are not empowered to dominate and bully management. Being affiliated to organised labour does not detract from the fact that they remain subordinate to their employer; are bound by the same rules and conditions of employment as other employees, and are obliged to obey and comply with all lawful and reasonable instructions given by the employer.

### Prescription

In *Food & Allied Workers Union on behalf of Gaoshubelwe & others v Pieman's Pantry (Pty) Ltd* (at 132) the Labour Appeal Court confirmed that the Prescription Act 68 of 1969 applies to all litigation under the LRA 1995.

### Labour Court — Jurisdiction

The Labour Court has confirmed, in *Farre v Minister of Defence & others* (at 174), that where the real dispute between a public service employer and employee, as set out in the employee's pleadings, relates to the interpretation and application of a collective agreement, the court does not have jurisdiction in terms of s 158(1)(h) of the LRA 1995 to review the decision of the employer. The dispute must be arbitrated.

### Settlement Agreement

The Labour Court has found that, when an arbitrator is approached to make a settlement agreement an award in terms of s 142A of the LRA 1995, he or she must determine whether the terms of the agreement are competent and proper to be made an arbitration award. Furthermore, the arbitrator may not exceed his or her power in terms of the LRA by making an agreement which exceeds the legal limitations imposed by the LRA an arbitration award. In this matter the settlement agreement provided that the municipality would pay an amount equivalent to five years' salary to an employee who had voluntarily resigned after ten months' employment. The court found that the terms of the agreement were 'absurd' and that s 194 of the LRA limited the amount of compensation that the arbitrator was competent to award. It set aside the award making the settlement agreement an arbitration award (*Lekwa Local Municipality v SA Local Government Bargaining Council & others* at 190).

## Residual Unfair Labour Practice — Benefits

In *Mputle and Neotel (Pty) Ltd* (at 263) a CCMA commissioner found that the employee had failed to prove that the employer exercised its discretion unfairly in relation to her rating for the purposes of a performance bonus and salary increase. He found, however, that the employer had not adhered to its own policy on performance management, and awarded the employee limited compensation for the procedural unfairness.

## Practice and Procedure

In *Commercial Stevedoring Agricultural & Allied Workers Union on behalf of Dube & others v Robertson Abattoir* (at 121) the Labour Appeal Court set aside a Labour Court order granting the respondent employer absolution from the instance where it found that the applicant union had provided sufficient evidence which raised a credible possibility of an automatically unfair dismissal and the court was therefore obliged to consider all the evidence in order to determine whether the dismissal took place and for what reason.

Where an employee had litigated unsuccessfully against his former employer in four separate courts and failed to satisfy five separate costs orders against him, the Labour Court declined to invoke the provisions of the Vexatious Proceedings Act 3 of 1956 and declare the employee a vexatious litigant. It did, however, order that the employee could not pursue further litigation against his former employer until the costs orders were satisfied and without putting up security for further costs (*Maseko v Commission for Conciliation, Mediation & Arbitration & others* at 203).

### *Quote of the Month:*

Mogoeng CJ in *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* (2017) 38 ILJ 97 (CC) on the use of the word ‘kaffir’ in the workplace:

‘The use of this term captures the heartland of racism, its contemptuous disregard and calculated dignity-nullifying effect on others. It bears repetition that [the employee’s] utterances constitute a racial minefield in the workplace ever-ready to explode at the slightest provocation. Conduct of this kind needs to be visited with a fair and just but very firm response by this and other courts as custodians of our constitutional democracy, if we ever hope to arrest or eliminate racism. Mollycoddling cannot cut it.’