

# HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

## Transfer of Business as Going Concern

The Constitutional Court has confirmed, in *Rural Maintenance (Pty) Ltd & another v Maluti-A-Phofung Local Municipality* (at 295), that the accepted test to determine whether there has been a transfer of a business as a going concern under s 197 of the LRA 1995 is an assessment of all the relevant factors. In this matter, the Labour Appeal Court, applying the proper test, had found on the evidence before it that Rural had not handed certain components of its electricity supply operation back to the municipality, and that the provisions of s 197 had not been triggered. It had not applied a new test nor imported a different test from European jurisprudence. There was no need, in the circumstances, to reformulate or develop the existing law on the interpretation and application of s 197. The court accordingly upheld the decision of the Labour Appeal Court. Relying on the above decision in *Rural*, the Labour Court, in *Rosond (Pty) Ltd v Western Platinum Ltd & others* (at 454), found that the transferee, which retained essential assets comprising the means to conduct the service business, could not seek to transfer its obligations to its employees under the guise of s 197 where it retained for itself the means it used to conduct the service business.

## Unfair Discrimination — Disability

An employee was disfigured and suffered from a speech impediment arising from an attempted suicide. Although his employer initially indicated that it wanted him to return to work, it later refused to allow him to resume work on the basis that he was ‘cosmetically unacceptable’. The Labour Court found that the employee was a ‘person with disabilities’ in terms of the Employment Equity Act 55 of 1998 and was entitled to the Act’s protection. It found that the employer equated disability with incapacity and that its conduct constituted discrimination. As there was no evidence that the employee was unfit for duty, the discrimination was unfair. The employee was awarded both compensation and damages (*Smith v Kit Kat Group (Pty) Ltd* at 483).

## Retrenchment

A trade union had adopted a confrontational and obstructive approach to facilitated retrenchment consultations and had systematically placed obstacles in the way of proper consultations with the objective of compelling the company to abandon the retrenchment process. The Labour Court found that, in circumstances where the union had intentionally failed to participate in the consultation process, it was patently unacceptable for the union to approach the court seeking relief under s 189A(13)(a)-(c) of the LRA 1995 (*Communication Workers Union v Telkom SA SOC Ltd & others* at 360).

In *SA Commercial Catering & Allied Workers Union & others v Southern Sun Hotel Interests (Pty) Ltd* (at 463) the Labour Court found that the consolidation or co-hearing of procedural issues raised in an application in terms of s 189A(13) with substantive fairness issues raised in a referral in terms of s 191(5)(b)(ii) was not permissible in terms of the LRA. In *National Union of Mineworkers v Ezulwini Mining Co (Pty) Ltd & others* (at 448) the Labour Court confirmed that the consultation process in terms of s 189 or 189A of the LRA 1995 and the process in terms of s 52 of the Mineral and Petroleum Resources Development Act 28 of 2002 are two separate processes, which may become interlinked. However, the completion of the former is not necessarily subject to completion of the latter.

## Reinstatement

An employee's dismissal was found to be substantively and procedurally unfair because the employer had relied on false and defamatory complaints laid by his subordinates to secure his dismissal. The CCMA commissioner nonetheless declined to reinstate the employee. In review proceedings, the court confirmed that the primary remedy of reinstatement was warranted unless the employer showed that reinstatement was intolerable. In this matter the reasons advanced by the employer, and accepted by the commissioner, were indistinguishable from the charges that the employer had been unsuccessful in proving against the employee. The court ordered his reinstatement (*Jonas v Commission for Conciliation, Mediation & Arbitration & others* at 376).

## Disciplinary Enquiry

In *Mathabathe v Nelson Mandela Bay Metropolitan Municipality & another* (at 391), the Labour Court found that the employee had been afforded a proper disciplinary hearing when the disciplinary chairperson had ruled that the parties be heard by way of written submissions.

## Disciplinary Penalty

In *SA Municipal Workers Union on behalf of Cindi & another v SA Local Government Bargaining Council & others* (at 472) the Labour Court confirmed that the doctrine of suspension of an order of court upon the noting of an appeal is not applicable in the industrial relations environment. An employee's dismissal is therefore not suspended by the noting of an internal appeal against his dismissal.

## Basic Conditions of Employment Act 75 of 1997

An employee was indebted to his employer in respect of two costs orders arising from prior litigation. The sheriff attached his bank account to satisfy the debt. In an application to the Labour Court to set aside the writ of execution, the court dismissed the employee's contention that the attachment constituted an unlawful deduction in terms of s 34 of the Basic Conditions of Employment Act 75 of 1997 — that section did not apply where an attachment was done by way of writ of execution and a bank account was attached in that process (*Mashego v Mpumalanga Provincial Legislature & others* at 382).

In *Mathabathe v Nelson Mandela Bay Metropolitan Municipality & another* (at 391), the Labour Court found that it had jurisdiction to determine an employee's complaint that the employer had breached her contractual right to a fair disciplinary hearing in terms of s 77(3) of the BCEA.

## Evidence

In *Clover SA (Pty) Ltd & another v Sintwa* (at 350) the High Court confirmed that, even though the CCMA is not part of the judiciary and is an administrative tribunal, its proceedings are quasi-judicial in nature. A defamatory statement made during its proceedings enjoys qualified privilege if the evidence is relevant, is based on reasonable grounds and is not motivated by malice.

In *Minister of Police v M & others* (at 402) the Labour Court found that, in appropriate factual circumstances in arbitration proceedings, the transcript of a properly run internal disciplinary hearing may carry sufficient weight to trigger the duty on an accused employee to rebut the allegations contained in the hearsay. The court set out guidelines on when, in arbitration proceedings, a single piece of hearsay, such as a transcript, may constitute prima facie proof of an allegation.

In *Mohokare Local Municipality v Makhube & others* (at 421) the Labour Court upheld a bargaining council arbitrator's ruling that an Auditor General's report was inadmissible hearsay evidence. The employer had relied solely on the report to find the employees guilty of fraudulent and dishonest activity without direct evidence by a suitable witness verifying the contents and findings of the report.

## Practice and Procedure

In three matters the Labour Court considered the consequences of noncompliance with the provisions of the Labour Court Practice Manual. In *MJRM Transport Services CC v Commission for Conciliation, Mediation & Arbitration & others* (at 414) and *SA Municipal Workers Union on behalf of Mlalandle v SA Local Government Bargaining Council & others* (at 477) the court held that, in the absence of a request for and consent to an extension of the time for filing of the record of proceedings, clause 11.2.3 of the manual deems that a review application has been withdrawn and the applicant must approach the Judge President for an extension by way of application. Such an application is akin to an application for condonation, and the usual principles applicable to condonation applications are applicable. Similarly, in *National Education Health & Allied Workers Union on behalf of Leduka v National Research Foundation* (at 430), where a review application had been archived in terms of clause 16.1 of the manual, the court confirmed that the factors relevant in condonation applications had to be taken into account when deciding whether to reinstate the matter and condone the delay. In this matter, there had been an excessive delay of six years and an abysmal explanation had been tendered, the court accordingly declined to condone the delay.

### *Quote of the Month:*

Snyman AJ in *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC):

‘This matter was borne out of a tragic event, which, instead of being resolved on the basis of compassion and good sense, escalated into unfortunate litigation on the basis of discrimination. I am still surprised how often employers can be short-sighted where it comes to the personal circumstances of their employees. The employment relationship, in the modern constitutional era, is akin to a marriage and as an employer one has to ask oneself how one would treat one’s spouse in the case of personal tragedy, and then act accordingly.’