

# HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

## Prescription of Arbitration Awards

In a unanimous order the Constitutional Court held, in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus & others* (at 527), that an arbitration award issued in favour of the employee had not prescribed after three years. However, the reasons for achieving this result differed, with the court handing down three separate judgments. In the first judgment, Jafta J found, inter alia, that the Prescription Act 68 of 1969 and the Labour Relations Act 66 of 1995 are fundamentally different and that the Prescription Act does not apply to arbitration awards issued in terms of the LRA. In a separate judgment Zondo J concurred with Jafta J and provided additional reasons why the Prescription Act does not apply to the LRA dispute-resolution system. Although he arrived at the same order, Froneman J reasoned that the Prescription Act requires reinterpretation, but that this does not necessitate a finding that its provisions are inconsistent with the provisions of the LRA.

## Dismissal — Insubordination

A municipal employee in a management position defied the municipal manager's instruction to stop representing employees in disciplinary enquiries instituted by the municipality. The Labour Appeal Court confirmed that the instruction was lawful and reasonable and that the employee's conduct amounted to gross insubordination. In addition, the employee had blatantly and public challenged the authority of the municipal manager, had dared him to take action and had shown no remorse. In these circumstances, dismissal was the appropriate sanction (*Msunduzi Municipality v Hoskins* at 582).

## Unfair Labour Practice — Demotion

The Labour Appeal Court has found that, when a full-time shop steward ceases to hold that office and resumes her duties in the position that she held at the employer prior to appointment as shop steward, that does not constitute a demotion (*Mhlelude v SA Airways (SOC) Ltd & others* at 577).

## Unfair Discrimination

In *Gumede and Crimson Clover 17 (Pty) Ltd t/a Island Hotel* (at 702) a CCMA commissioner found that the employer's conduct in judging the employee adversely on the basis of body odour was discriminatory and unfair, and he awarded the employee compensation. However, in *Ngwabe and Invula Quality Protection (Pty) Ltd* (at 724) a commissioner rejected an employee's claim that he had been subjected to unfair discrimination relating to his disability when a co-worker referred to him as 'one eye'. The employer had taken appropriate disciplinary steps against the coworker for the insensitive comment and the co-worker had apologised. In *National Education Health & Allied Workers Union on behalf of Zuma and KZN Legislature* (at 717) a commissioner rejected an employee's claim that a disparity in pay amounted to unfair discrimination. The differentiation was neither irrational nor capricious and did not prejudice the employee.

In *Khumalo and Enforce Security Services (Pty) Ltd* (at 711) the employee claimed that his employer had unfairly discriminated against him by falsely disclosing his status as HIV positive thereby impairing his dignity. The CCMA commissioner found, however, that the real dispute related to disclosure of information in terms of the Employment Equity Act 55 of 1998, and that it had no jurisdiction to determine the matter.

## Contract — Consultancy Agreement

The Labour Appeal Court, in *Vermooten v Department of Public Enterprises & others* (at 607), found that when parties in a relatively equal bargaining position consciously elect one contract or relationship over another, legal effect should be given to their choice. In this matter, the appellant and the respondent department consciously and deliberately elected to structure their relationship as one other than an employment relationship, and the consultancy agreement entered into by the parties was not a sham. In the absence of any overriding policy considerations, neither a tribunal nor a court could ignore its terms.

## Contract of Employment — Automatic Termination Clause

A term in the appellant's contract of employment to the position of close protection officer to the municipal manager provided that his appointment was subject to a vetting process and that, if that process revealed 'negative outcomes', the contract would be automatically terminated. Negative information relating to misconduct and criminal activities was provided by the appellant's previous employer. The municipality invoked the automatic termination clause. The Labour Appeal Court found that the appellant had freely and voluntarily agreed to the vetting and to an automatic termination if the vetting yielded a negative result. The vetting result was patently and objectively negative of and concerning the appellant's suitability for the position. The termination was triggered automatically and not by an act of the employer aimed at ending the employment relationship. The court therefore upheld the bargaining council arbitrator's finding that the appellant had not been dismissed (*Nogcantsi v Mnquma Local Municipality & others* at 595).

## Contract of Employment — Suspensive Condition

The applicant's contract of employment was subject to the condition that he had to secure a valid work permit. The respondent bank accepted a copy of a work permit supplied by the applicant and confirmed his employment. It later formed suspicions about the validity of the work permit and suspended the applicant. In an application for urgent interim relief pending determination of an unfair labour practice dispute relating to suspension, the Labour Court was satisfied that, for purposes of this application, the suspensive condition had been fulfilled when the applicant produced the work permit and the bank accepted it. Until the bank determined that the permit was invalid and unequivocally communicated its decision to the applicant, he remained an employee of the bank (*Kawalya-Kagwa v Development Bank of Southern Africa* at 643).

## Retrenchment

In *Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Hlophe & others v Bayfibre Central Co-operative Ltd* (at 627) the Labour Court found that the employer had acted precipitately when retrenching. It became obvious shortly after the retrenchment that the employer had retrenched too many employees and was compelled to hire more staff. Instead of recalling the newly retrenched employees, it relied on employees of a labour broker. The conclusion was irresistible that the employer wanted to rid itself of its employees and the decision to retrench had no rational operational justification.

In *Viljoen v Johannesburg Stock Exchange Ltd* (at 671) the employee refused to consult meaningfully on alternative positions when her position was made redundant. The Labour Court found that the employee's own conduct gave rise to her dismissal, and that she forfeited the right to severance pay.

## Mine Health and Safety Act 29 of 1996

In *AngloGold Ashanti Ltd v Mbonambi & others* (at 614) the Labour Court considered the purpose of an instruction issued by a mine inspector in terms of s 54(1) of the Mine Health and Safety Act 29 of 1996. It noted that s 54(1) requires the inspector objectively to establish that a state of affairs exists that would lead a reasonable person to believe that it may endanger the health or safety of any person at the mine and contemplates that the instruction must be limited to the extent necessary to protect the health and safety of that person; hence the instructions must be proportional to the issues identified by the inspector.

In *Impala Platinum Ltd v Mothiba NO & others* (at 636) the Labour Court set aside an administrative fine imposed by the principal inspector of mines in terms of s 55B of the MHSA on the basis that the inspector had failed to give the applicant mining company the opportunity to address him on material that he had relied on to impose the fine.

## Evidence

A municipal employee pleaded guilty to certain charges relating to overtime claims and was dismissed. In arbitration proceedings the employee changed her evidence, denied guilt and alleged that she had been coerced into pleading guilty. It came to light that she had been pressured to plead guilty and falsely implicate her manager and was merely a pawn caught up in a power struggle between managers for the office of municipal manager. The arbitrator had no hesitation in accepted the employee's unchallenged version and found that she had been unfairly dismissed (*SA Municipal Workers Union on behalf of Ntenza and Nkosi Langalibalele Local Municipality* at 728).

## Practice and Procedure

In *G-Ways CMT Manufacturing (Pty) Ltd v National Bargaining Council for the Clothing Manufacturing Industry (Western Cape Sub-chamber) & others* (at 571) the Labour Appeal Court found that, where arbitration proceedings had been conducted without notice to the liquidator after liquidation of the employer, the proceedings had been irregular. It found further that, if the dispute related to an alleged transfer of a business in terms of s 197 of the LRA 1995, the arbitrator had not been entitled mero motu to join the 'new' employer to the award — if the employees wished to hold the new employer liable, they had to apply for its joinder to the arbitration proceedings. The court set aside the arbitration award and ordered that the matter be remitted to the bargaining council for a fresh hearing.

The applicant municipality applied to review an arbitration award and furnished security in terms of s 145(8) of the LRA 1995. The employee thereafter obtained a writ of execution from the Labour Court. The municipality applied to have the writ set aside on the basis that it was issued in breach of ss 145(7) and 143(5). The court found that, for a writ to be issued in circumstances where it is already, in terms of s 143(5), deemed to be issued once the award has been certified, is an exercise in legal superfluity. The court found further that, once the registrar is satisfied with the security provided in terms of s 145(8), the operation of an arbitration award is suspended (*Moqhaka Local Municipality v Motloung & others* at 649).

In *Premier Foods (Pty) Ltd (Nelspruit) v Commission for Conciliation, Mediation & Arbitration & others* (at 658) the Labour Court restated the duties of commissioners conducting con-arb proceedings. It highlighted the problems that may arise when a commissioner discusses the merits and evidence during the conciliation hearing and then later sits as arbitrator. The court found that, in this matter, the arbitrator who commented on the employer party's prospects of success during the conciliation hearing, ought to have recused himself from hearing the arbitration and his failure to do so vitiated the subsequent arbitration proceedings.

### *Quote of the Month:*

Not awarded.