

# HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

## Collective Agreements — Extension to Non-parties

In a unanimous judgment the Constitutional Court upheld the judgment of the Labour Appeal Court in *Association of Mineworkers & Construction Union & others v Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co (Pty) Ltd & others* (2016) 37 ILJ 1333 (LAC) which had found that a collective agreement concluded between the employers' organisation and the majority trade unions in the gold mining industry could be extended in terms of s 23(1)(d) of the LRA 1995 to bind members of a non-party union. The Constitutional Court found, inter alia, that the statutory definition of 'workplace' applied to s 23(1)(d), and that whether the place where employees worked constituted a separate 'workplace' was not dependent on geography or location but on functional organisation. The court rejected the union's constitutional challenge, finding, inter alia, that the limitation on the right to strike in s 23(1)(d) was reasonable and justifiable based on the principle of majoritarianism, which benefitted collective bargaining (*Association of Mineworkers & Construction Union & others v Chamber of Mines of SA & others* at 831).

In *Association of Mineworkers & Construction Union & others v Bafokeng Rasimone Management Services (Pty) Ltd & others* (at 931) the Labour Court also dealt with the extension of collective agreements to non-parties in terms of s 23(1)(d) and the constitutionality of the section. It found that, where the employer had consulted with the majority unions as required by s 189(1)(a)-(c) of the LRA 1995 and entered into a retrenchment agreement with those unions, that collective agreement could be extended to nonparties in terms of s 23(1)(d). It was satisfied that neither s 23(1)(d) nor s 189(1)(a)-(c) infringed or violated the constitutional rights of members of non-party unions.

In *Sasol Mining (Pty) Ltd v Association of Mineworkers & Construction Union & others* (at 969) the Labour Court found that, in order for a collective agreement to be extended to non-parties, all the requirements of s 23(1)(d) must be complied with; this includes that the agreement must expressly state that it binds the employees who are not members of the trade unions that are signatories to the agreement.

In *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA on behalf of Members* (at 926) the Labour Appeal Court found that, even where the business operations of the employer were excluded from the relevant bargaining council's main agreement, the agreement was nonetheless binding on the employer and the union. This was so because the terms of the bargaining council agreement had been incorporated into the employment relationship in terms of a collective agreement entered into between the employer and the union and various other objective factors which showed that the parties had regarded themselves as bound by the terms of the bargaining council agreement.

### Dismissal — Dishonesty

The Labour Appeal Court, in *Schwartz v Sasol Polymers & others* (at 915), found that, where a senior employee had failed to disclose the receipt of gifts, sponsorships and money from service providers, this constituted serious misconduct. The employee had been obliged to act with honesty, diligence and good faith towards his employer, and the dishonest nature of his misconduct made continued employment intolerable.

Similarly, in *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 860), the Labour Appeal Court confirmed that dishonesty is serious misconduct which destroys the substratum of the employment relationship. And in *Impala Platinum Ltd v Jansen & others* (at 896) the court confirmed that gross misconduct goes to the root of the employment relationship and that, where an employee is found guilty of gross misconduct, it is not necessary to lead evidence pertaining to a breakdown in the trust relationship as an employer cannot be expected to retain a delinquent employee in its employ.

The Labour Appeal Court upheld the dismissal of an employee who had failed to disclose two criminal convictions in his application for employment. It found that the deliberate concealment of the true facts constituted dishonesty and that the fact that a long time had elapsed after the non-disclosure did not negate the seriousness of the misconduct (*G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO & others* at 881).

### Dismissal — Poor Work Performance

Where an employer had been dismissed for failure to meet a stipulated target, the Labour Appeal Court found that the period which had been set to meet the target had been too short or the target has been incapable of being achieved. It was clear that the employee had been set up to fail and his dismissal for poor work performance was therefore unfair (*Damelin (Pty) Ltd v Solidarity on behalf of Parkinson & others* at 872).

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

In *Moshoeshoe and Neotel (Pty) Ltd (2)* (at 986) the employer had changed the penalty of a final written warning imposed by the disciplinary chairperson to dismissal. Relying on recent Constitutional Court authority, the CCMA commissioner confirmed that the employer was not allowed to interfere in the outcome of a disciplinary enquiry where the chairperson had final decision-making power. Although the commissioner found that the sanction of dismissal was harsh in the circumstances, in the exercise of his discretion, he declined to reinstate the employee as it was clear that the employment relationship had become intolerable.

## Unfair Labour Practices — Promotion and Demotion

A public service employer had failed to apply its own advertised requirements when promoting a candidate who did not fulfil the requirements. The Labour Appeal Court found that the process had been flawed by the selection of a candidate who did not meet the advertised requirements and her appointment constituted an unfair labour practice in relation to the applicants who met the requirements (*Health & Other Service Personnel Trade Union of SA & others v Member of the Executive Council for Health, Eastern Cape & others* at 890).

In *Ncane v Lyster NO & others* (at 907) the Labour Appeal Court confirmed that a bargaining council arbitrator can only interfere with an employer's decision to promote where the decision is irrational, grossly unreasonable or mala fide.

In *Moshoeshoe and Neotel (Pty) Ltd (1)* (at 977) a CCMA commissioner confirmed that disputes about transfers are not dealt with specifically in the LRA 1995 and cannot be arbitrated unless the transfer impacts on the provision of benefits, amounts to a demotion, is imposed as a disciplinary penalty short of dismissal, or results in a constructive dismissal. In this matter the employee failed to adduce evidence that showed that his transfer constituted a demotion.

## Employee or Independent Contractor

In *Minter-Brown and Kagiso Media t/a East Coast Radio* (at 1006) a private arbitrator relied on the applicable legal principles and case law to determine whether the relationship between the claimant and the radio station was that of master and servant or an independent contractor. He found, inter alia, that although the parties termed the relationship as one of independent contractor, it was clear that the relationship was genuinely one of master and servant, and that the claimant was therefore an employee of the radio station.

## Public Service — Temporary Incapacity Leave

The Department of Correctional Services failed to respond to an employee's application for temporary incapacity leave within 30 days as required by the department's own policy, and later commenced deductions from the employee's salary to recover the amount owed for the unapproved portion of sick-leave taken by the employee. In an application to declare the deductions unlawful, the Labour Court found that the department's failure to respond to the application for temporary incapacity leave within the time set out in its policy did not translate into an entitlement to sickleave. The department was therefore entitled to claim back the amount it had conditionally paid to the employee while his application for sickleave was being assessed (*Police & Prisons Civil Rights Union & another v Department of Correctional Services & another* at 964).

### *Quote of the Month:*

Not awarded.