

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Contract of Employment — Automatic Termination Clause

In two matters before the courts service provider employers had placed employees with clients in terms of contracts of employment which provided that the duration of the employees' employment was dependent on the duration of the employer's contract with the client. In *Enforce Security Group v Fikile & others* (at 1041) the Labour Appeal Court held that an automatic termination clause based on an event contained in a fixed-term contract of employment will not always be visited with invalidity; that would defeat the purpose of concluding fixed-term contracts for legitimate reasons. It is necessary to determine whether, in the circumstances of a particular case, the clause was intended to circumvent the fair dismissal obligations imposed on the employer by the LRA 1995 and the Constitution 1996. However, in *Association of Mineworkers & Construction Union & others v Piet Wes Civils CC & another* (at 1128), the Labour Court found that the termination of the contract by the client was not a 'specific event' for the purposes of s 198B(1) of the LRA, and that the termination of the employees' employment was a dismissal.

Contract of Employment — Private Arbitration Clause

In *SA Football Players Union & others v Free State Stars Football Club (Pty) Ltd* (at 1111) the Labour Appeal Court confirmed that a clause in a contract of employment which provides for referral of disputes to an internal disputes resolution forum should be adhered to unless there are compelling reasons not to do so. On the facts in this matter the court found that there were compelling reasons why the Labour Court was a more suitable forum than the Dispute Resolution Chamber of the NSL to determine a termination of employment dispute between professional football players and their club.

Contract of Employment — Professional Football Players

In *Gaxa and Kaizer Chiefs Football Club* (at 1221) the Dispute Resolution Chamber of the NSL found that, where a particular procedure had to be adopted when entering into or extending a football contract, and that procedure had not been followed, the player's fixed-term contract had not been extended. In addition, the mere fact that the club had made an announcement on social media that the player's contract had been extended did not meet the requirements of a 'data message' that concluded an agreement in terms of the Electronic Communications and Transactions Act 35 of 2002.

In *Lamontville Golden Arrows Football Club and Manaka & another* (at 1231) the chamber found that the player had repudiated his contract of employment by failing to return to work after his annual leave. The club was therefore entitled to cancel the contract and claim damages for breach from the player. The chamber awarded damages against the player and his new club and imposed sporting sanctions on the player.

Registrar of Labour Relations — Revocation of Designation

Following the revocation of his designation as Registrar of Labour Relations by the Minister of Labour, Mr Crouse approached the Labour Court which reviewed and set aside her decision. On appeal by the minister, the Labour Appeal Court upheld the court a quo's findings that the minister's decision constituted administrative action and was subject to review under the Promotion of Administrative Justice Act 3 of 2000; alternatively, that the minister's decision was subject to review on the principles of legality (*Minister of Labour & another v Public Servants Association of SA & another* at 1075).

Reinstatement

A public service employer had interfered with the sanction imposed on an employee by the chairperson of a disciplinary enquiry contrary to its own guidelines, and dismissed the employee. A bargaining council arbitrator found that the dismissal was unfair and reinstated the employee. On appeal the Labour Appeal Court relied on the recent Constitutional Court judgment in *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* (2017) 38 ILJ 97 (CC), to find that, once the arbitrator had concluded that the employee's dismissal was unfair, he had to consider, in terms of s 193(2) of the LRA 1995, whether reinstatement was the appropriate remedy. It was clear that he had not done so; he had not considered the seriousness of the misconduct and its potential impact in the workplace and whether that would render reinstatement inappropriate (*Moodley v Department of National Treasury & others* at 1098).

Settlement Agreements

While a s 197 transfer dispute was being arbitrated, the employer entered into s 189 consultations with employees, and concluded a settlement agreement with the employees. The settlement agreement was made an order of court by the Labour Court. On appeal by the employer, the Labour Appeal Court was satisfied that the settlement agreement met the statutory requirements of s 158(1)(c) read with s 158(1A) — it was in writing and was in settlement of a long-standing dispute between the parties, which either party had the right to refer to arbitration or to the Labour Court (*Fleet Africa (Pty) Ltd v Nijs* at 1059).

Basic Conditions of Employment Act 75 of 1997 — Transportation and Night Work

In *TFD Network Africa (Pty) Ltd v Singh NO & others* (at 1119) the Labour Appeal Court interpreted a provision in a bargaining council agreement, mirroring s 17(2)(b) of the Basic Conditions of Employment Act 75 of 1997, which provided that an employer could only require an employee to perform night work if transportation was available between the employee's place of residence at the commencement and conclusion of the employee's shift.

Retrenchment — Mass Retrenchments

In *National Union of Metalworkers of SA on behalf of Members v Toyota SA Motors (Pty) Ltd* (at 1162) the Labour Court dismissed an application in terms of s 189A(13) of the LRA 1995 after finding that, for purposes of relief under the section, the term 'consulting party' had a limited meaning and could not be extended beyond the purview of s 189 and s 189A so as to include consultation by a union and an employer on other labour related matters falling outside ss 189 and 189A.

Strikes — Issue in Dispute

The Labour Court confirmed that the court should be cautious about intervening to determine the 'true or real issue' in dispute when the issue is clear from the description in the union's referral documents. In this matter the union complained about the employer's unilateral change to terms and conditions of employment — a dispute that could legitimately be the subject of a referral in terms of s 64(1) and thus the subject of a strike, and the court could not itself determine that the dispute was one that related to benefits that had to be referred to arbitration and over which the employees were not entitled to strike (*Sibanye Gold Ltd v Association of Mineworkers & Construction Union & others* at 1193).

Appeal — Application to Enforce Judgment Pending Appeal

In *Luxor Paints (Pty) Ltd v Lloyd & another* (at 1149) the Labour Court found that the Labour Court falls within the definition of 'Superior Court' in s 1 of the Superior Courts Act 10 of 2013 and that the provisions of that Act apply unless specific legislation in conflict with the Act pertains to the Labour Court. As there is no specific provision in the LRA 1995 or the Labour Court Rules regulating the status of orders that are subject to an appeal or an application for leave to appeal, the provisions of s 18 of the SC Act, regulating the suspension of decisions pending appeal, apply to the Labour Court. The court therefore declined to follow the interpretation adopted in *L'Oreal SA (Pty) Ltd v Kilpatrick & another* (2015) 36 ILJ 2617 (LC), that the Labour Court is at liberty to import or adopt provisions of the SC Act on a selective and ad hoc basis. The *Luxor Paints* decision was followed in *Matsepe v Liberty Group (Pty) Ltd* (at 1155) and in *Wenum v Maquassi Hills Local Municipality* (at 1213).

Practice and Procedure

In several decisions the Labour Court confirmed that the primary purpose of civil contempt proceedings is to ensure compliance and not to punish. In *Independent Municipal & Allied Trade Union on behalf of Joubert v Modimolle Local Municipality & another* (at 1137) the court found that the employer was not in wilful and mala fide non-compliance with an order promoting the employee where the employee was no longer in its employ and the relief afforded had become incompetent. In *Robertson Winery (Pty) Ltd v Commercial Stevedoring Agricultural & Allied Workers Union & others* (at 1171) the court found the union and certain members to be in wilful and mala fide non-compliance with an interdict and picketing rules. It found further that, even if the breaches were not major and there had been no violence, those breaches could not go unpunished as to leave them unpunished would be to countenance a culture of impunity and would further undermine the rule of law. In *Sithole v Enlightened Security Force (Pty) Ltd & another* (at 1202) the court found that there was sufficient doubt whether the employer's opposition to complying with the court order had been mala fide, even if it had been deliberate, and in those circumstances it could not be held to be in contempt of court on this occasion. This defence was not, however, available to the employer going forward because the employer was not relieved of its obligation to comply with the court order while it was still in force.

Quote of the Month:

Steenkamp J in *Robertson Winery (Pty) Ltd v Commercial Stevedoring Agricultural & Allied Workers Union & others* (2017) 38 ILJ 1171 (LC):

‘Again, I must stress that in this case, CSAAWU did not reject the granting of the court order; indeed, it was granted by agreement. Yet the union’s leadership and its members continued to breach at least aspects of the order. Even if those breaches were not as major or as violent as is, regrettably, the case in many other strike situations, to leave it unpunished would be to countenance a culture of impunity and it would further undermine the rule of law.’