

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Prescription

The Constitutional Court, noting that the applicant employee's case corresponded in material respects with the case of *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus & others* (2017) 38 ILJ 527 (CC), which it had recently decided, granted her direct access and decided the matter without receiving written submissions or hearing oral argument. It found that, whichever of the approaches adopted by it in *Myathaza* were applied, the reinstatement order contained in the arbitration award in the employee's favour had not prescribed even though more than three years had elapsed since the date of the award (*Mogaila v Coca Cola Fortune (Pty) Ltd* at 1273).

Trade Unions — Registration and Rivalry

In *Independent Municipal & Allied Trade Union v Municipal & Allied Trade Union of SA & others* (at 1283) the Labour Appeal Court dismissed an appeal by IMATU against a judgment that found that the name and acronym of the first respondent union, MATUSA, were not so similar to that of IMATU as to mislead or cause confusion in the manner contemplated in s 95(4) of the LRA 1995.

In *City of Johannesburg v SA Municipal Workers Union & others* (at 1342) the Labour Court was approached to determine which office-bearers of two rival factions of SAMWU were the legitimately and lawfully elected officials of the union. The court expressed its concern that the court was increasingly being called upon to manage internal trade union strife, and it commented that senior elected union officials should put the interests of members above their own and stop fighting for the purse strings and control of unions.

Health and Safety

The Labour Court noted that an employer is obliged at common law to take reasonable care of the health and safety of employees by providing them with a reasonably safe system of work. Although an employer is obliged to take action to combat labour unrest and any inter-union hostility that discloses a potential for violence and injury, the standard is that of reasonableness, and absolute safety under all circumstances is not guaranteed to a worker by his or her contract of employment (*National Union of Mineworkers & others v Impala Platinum Ltd & another* at 1370).

Restraint of Trade

In *Labournet (Pty) Ltd v Jankielsohn & another* (at 1302) the Labour Appeal Court upheld a judgment of the Labour Court in which it held that the employer had failed to show any protectable interest. It reiterated the well-established legal principles applicable to restraint of trade agreements, and confirmed that an employee cannot be restrained from taking away his experience, skills or knowledge, even if those were acquired as a result of training provided by the employer.

Sexual Harassment

The Labour Appeal Court held that where an employee has been sexually harassed by a colleague and that conduct has been brought to the attention of the employer, the employer is required by s 60(2) of the Employment Equity Act 55 of 1998 to consult with the parties and to take the necessary steps to eliminate the conduct complained of and to protect the employee.

In this matter the employer had failed to do so, and was liable for contravention of the EEA (*Liberty Group Ltd v M* at 1318). However, in *B and Ennambithi/Ladysmith Municipality* (at 1437) a CCMA commissioner found that, where the employee had never reported the alleged sexual harassment, the employer could not be held liable. He found further that, as the employee was claiming damages against the employer municipality for sexual harassment at the hands of an elected councillor who was not an employee of the municipality, the CCMA had no jurisdiction.

In *University of Venda v M & others* (at 1376) the Labour Court found that, where a university lecturer had promised better marks to female students in exchange for sexual favours, this constituted quid pro quo sexual harassment, and the dismissal of the lecturer was justified. Similarly, in *A M and Metso Minerals SA (Pty) Ltd* (at 1452) a bargaining council arbitrator found that an employee's persistent flirting with the complainant after she had made it clear to him that she was not interested constituted unwanted and unwelcome conduct of a sexual nature. The employee's dismissal for sexual harassment was upheld.

Unfair Discrimination

In *Beckley and Paul Venter Financial Advisors* (at 1431) a CCMA commissioner found that the employer's refusal to retain an employee when she fell pregnant constituted unfair discrimination. In *Luke and City of Johannesburg* (at 1442) a commissioner found that an applicant for employment failed to show that the city had treated him differently on the basis that he came from a particular social background and that this constituted unfair discrimination on the basis of social origin. However, in *Nombewu and Department of Rural Development & Land Reform* (at 1446) a commissioner found that the employer's refusal to appoint the applicant to a post because of her criminal record amounted to unfair discrimination.

Transfer of Business as Going Concern

The Labour Court found that the perfection of a notarial bond and the consequent taking possession of movable property to realise an indebtedness does not per se constitute a transfer as contemplated in s 197 of the LRA 1995. Where property is taken to realise an indebtedness and the property is sold for that purpose, there is no transfer of a business as a going concern. However, where, as in this matter, the company took control of the businesses, continued to operate the businesses under the same names at the same premises, retained all the employees except the manager and finance manager, and later sold the businesses as going concerns, the court was satisfied that there had been a transfer of the businesses as going concerns to the company. It found that the summary termination of employment of the manager and finance manager of the businesses therefore constituted automatically unfair dismissals as envisaged by s 187(1)(g) of the LRA (*Vermaak & another v Sea Spirit Trading 162 CC t/a Paledi Super Spar & others* at 1411).

Disciplinary Code and Procedure

The Labour Appeal Court has confirmed that there is no need to hold a disciplinary enquiry when the employer's repeated attempts to contact the employee to attend an enquiry have been unsuccessful (*Mhlongo v SA Revenue Service* at 1334).

Resignation

An employee resigned and, during her notice period, received a notice to attend a disciplinary hearing. She then resigned with immediate effect. The Labour Court found that there is no requirement in law that an employee cannot resign with immediate effect during the notice period. A consequence is that the employment contract is immediately terminated and the employer has no power to exercise discipline over the employee. The court therefore declared the disciplinary hearing against the employee to be null and void (*Mtati v KPMG Services (Pty) Ltd* at 1362).

Practice and Procedure

The Labour Appeal Court once again dealt with the question whether to remit or hear a matter in the absence of an adequate arbitration record before the Labour Court on review. It found that, where remittal for hearing afresh may trigger prejudice to the parties, the court should hear the matter, especially if the parties wish to press on despite the imperfection of the record (*Intellectual Democratic Workers Union on behalf of Linda & others v Super Group & others* at 1292).

Quote of the Month:

Snyman AJ in *City of Johannesburg v SA Municipal Workers Union & others* (2017) 38 ILJ 1342 (LC):

‘The time has surely come where the senior elected officials of trade unions have to put the interests of their members above their own, and stop fighting for the purse strings and control of the union. There has in the recent past been simply too much litigation coming to this court in order to resolve this kind of strife. ... [I]t was not appreciated, when s 158(1)(e) was enacted, to what extent this court would be called upon to manage internal trade union strife. I have no hesitation in saying that it should not be the function of this court to manage the affairs of trade unions, and even though the Labour Court is competent to do so, the current escalation of the practice of managing internal trade union strife through this court must be discouraged.’