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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Prescription — Claim for Arrear Wages Due under Reinstatement Order

In *National Union of Metalworkers of SA on behalf of Fohlisa & others v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd)* (at 1560) the Constitutional Court handed down two judgments on whether the prescription period in respect of unpaid remuneration owing in terms of a Labour Court reinstatement order was three or 30 years. In the first judgment, the court found that there was no distinction between the period before the reinstatement order and the period thereafter until the employees were in fact reinstated. It found that the claim for arrear wages arose from the reinstatement order and constituted a judgment debt. The claim therefore prescribed after 30 years. In the second judgment, the court came to the same conclusion that the claim had not prescribed but for different reasons. It separated the claim into two distinct periods: that before the reinstatement order — the claim for this period was a judgment debt and the 30-year prescriptive period applied; and that after the order — the claim for this period was a contractual debt to which the three-year period of prescription applied. On the facts, this period had not elapsed. On both judgments, the employees were entitled to backpay for the entire period.

Contract of Employment — Fixed-term Contract — Renewal and Termination

An employee claimed that she had a legitimate expectation of renewal of her fixed-term contract premised on the recommendation of a selection panel which the premier of the province was obliged to follow, and that his refusal to follow the recommendation was unlawful. In the Labour Appeal Court's view, this dispute fell squarely within the realm of s 186(1)*(b)* of the LRA 1995 — characterising the dispute as having other characteristics too did not dispel the validity of the finding that it fell within the purview of s 186(1)*(b)*. The legislation contemplated that a claim that a fixed-term contract be renewed on the grounds of a legitimate expectation was a species of 'dismissal', as defined in s 186, and was regulated by s 191 to be within the exclusive jurisdiction of the CCMA. The court

therefore upheld the Labour Court's decision that it had no jurisdiction (*Zungu v Premier, Province of KwaZulu-Natal & another* at 1644).

In *Sihlali & others v City of Tshwane Metropolitan Municipality & another* (at 1692) the Labour Court found that the applicants could not rely on s 186(1)*(b)* where they had earlier refused to enter into fixed-term contracts. In *Baijnath and University of SA* (at 1702) a CCMA commissioner found that the employee had a reasonable expectation of renewal of his fixed-term contract where he had met the criteria of operational needs and performance and the employer had failed to show a rational basis for non-renewal. However, in *Fennel and Walter Sisulu University* (at 1716) a commissioner found that the employee had failed to provide evidence to substantiate his claim that the employer had made a verbal offer to extend his fixed-term contract. He had therefore failed to prove a reasonable expectation of renewal required by s 186(1)*(b)*.

Employees of a temporary employment service entered into contracts of employment linked to a project performed by a client. Following the termination of their services, a bargaining council arbitrator found that the employees had been unfairly dismissed. On review, the Labour Court found that the project was not identified in the contracts and this meant that there had been no meeting of minds on the terminating event that would serve to limit the duration of the contract. The employees were therefore employed on permanent and not fixed-term contracts, and the termination of the contracts amounted to an unfair dismissal (*Central Technical Services (Pty) Ltd v Metal & Engineering Industries Bargaining Council & others* at 1651). Where employees of a temporary employment service were employed on similar so-called limited duration contracts, a CCMA commissioner found that the termination of their contracts for reasons not related to the project on which they were employed constituted an unfair dismissal (*Nakeng & another and Capacity Outsourcing (Pty) Ltd & another* at 1722).

In *Dimane & others and Devtech Civils CC* (at 1726) the employer had, for reasons beyond its control, terminated the employees' fixed-term contracts before the expiry of the contracts. A bargaining council arbitrator found that the employer had no right to terminate the fixed-term contracts prior to the expiration date, and that, despite her sympathy for the employer's position, she had to find that the dismissals were both substantively and procedural unfair.

Contract of Employment — Casual Employee

An employment contract entitled the employer to place a casual employee at any site for operational reasons. After his dismissal for gross insubordination was found to be unfair, the arbitration award reinstated him in terms of his contract. In later proceedings, the Labour Court found that the award did not give the employee the right to be reinstated at the site at which he worked before dismissal; it merely confirmed that he was entitled to be reinstated in terms of his contract. It rejected the arbitrator's finding that the employee's working at that site became a term of his employment by custom and practice (*Edcon Ltd v Commission for Conciliation, Mediation & Arbitration & others* at 1660).

Contract of Employment — Reciprocal Rights and Obligations

In *Mpanza & another v Minister of Justice & Constitutional Development & Correctional Services & others* (at 1675) the Labour Court confirmed that a contract of employment is a contract with reciprocal rights and obligations. In this matter, the employees were under an obligation to work and the department was under an obligation to pay for their services. Where it was apparent that the employees were in breach of their contracts of employment by unlawfully failing to perform their obligations, the department became entitled, in law, to implement the no work no pay no benefit rule.

Constructive Dismissal

The employee claimed that he had resigned because of an affair between his wife and his employer. However, in a claim for constructive dismissal, the Labour Court found that the employee had known of the affair for several years and had forgiven both his wife and his employer. Moreover, it was clear that the true reason for his resignation was that the employee had found alternative employment with a competitor. The application was dismissed (*Niland v Ntabeni NO & others* at 1686).

Labour Court — Powers

In *Mashaba v SA Football Association* (at 1668) the Labour Court found that it did not have the power to prevent the conclusion of a private employment contract. This finding was endorsed in *Sihlali & others v City of Tshwane Metropolitan Municipality & another* (at 1692).

Bargaining Council — Jurisdiction

In *Department of Home Affairs & another v Public Servants Association & others* (at 1555) the Constitutional Court found that there was no distinction between a dispute of interest and a dispute of rights for the purpose of determining a bargaining council's jurisdiction to conciliate.

Urgent Interim Remedies

In *Mashaba v SA Football Association* (at 1668) the employee applied for an urgent interim order preventing the employer from filling his post pending the outcome of unfair dismissal arbitration proceedings. The Labour Court found that an employer could not thwart a dismissed employee's bid for reinstatement by replacing him and the mere employment of a replacement should not influence an arbitrator when determining whether reinstatement of the dismissed employee was appropriate. It found further that the court was not empowered to prevent the conclusion of private employment contracts.

In *Sihlali & others v City of Tshwane Metropolitan Municipality & another* (at 1692) the Labour Court refused to grant an interim order restraining the municipality from continuing with a recruitment process pending the finalisation of a s 197 dispute between the employees' employer and the municipality.

Shop Stewards — Status and Conduct

The Labour Appeal Court has confirmed the principle that a shop steward should fearlessly pursue the interests of his or her constituency and ought to be protected against any form of victimisation for doing so. The court found, however, that this is not a licence to resort to defiance and needless confrontation. A shop steward remains an employee, from whom his or her employer is entitled to expect conduct that is appropriate to that relationship. Assaults and threats are not conducive to harmony or to productive negotiation, and it is therefore unacceptable to hold that, when a person acts in a representative capacity, 'anything goes' (*National Union of Metalworkers of SA on behalf of Motloba v Johnson Controls Automotive SA (Pty) Ltd & others* at 1626).

Quote of the Month:

Not awarded.