

# HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

## Temporary Employment Service

The Labour Court had interpreted the deeming provision in s 198A(3)(b) of the LRA 1995 to mean that both the temporary employment service and the client become employers of the employees when the deeming provision applies (see *Assign Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2015) 36 ILJ 2853 (LC)). On appeal, the Labour Appeal Court found that the Labour Court had misdirected itself — the sole employer interpretation of the deeming provision in s 198A(3)(b) is in line with the purpose of the amendment to the LRA, the primary object of the LRA and the protection of rights of vulnerable workers. The employees are therefore deemed to be employees of the client and not the TES. The court noted that this interpretation does not ban TESs, it merely restricts them to genuine temporary employment (*National Union of Metalworkers of SA v Assign Services & others* at 1978).

An employee of a TES, Capacity, was placed with a client as a sales representative. She was counselled and ultimately dismissed by the client for poor performance. In unfair dismissal proceedings, the CCMA commissioner found that the employee was employed by Capacity and not the client, that Capacity had failed to address the employee's performance and that it had failed to comply with item 9 of the Code of Good Practice: Dismissal. The employee's dismissal was therefore substantively and procedurally unfair (*Morilly and Capacity Outsourcing (Pty) Ltd & another* at 2151).

## Bargaining Council Agreements — Extension to Non-parties

The Labour Court had found, in *Aviation Union of Southern Africa & others v SA Airways SOC Ltd & others* (2015) 36 ILJ 3030 (LC), that a collective agreement settling a retrenchment may be extended in terms of s 23(1)(d) of the LRA 1995 to non-parties and settles all disputes concerning the retrenchment process. On appeal, the Labour Appeal Court upheld this decision (*National Union of Metalworkers of SA on behalf of Members v SA Airways SOC Ltd & another* at 1994).

In *National Employers' Association of SA & others v Minister of Labour & others* (at 2034) the applicants approached the Labour Court to set aside the Minister of Labour's decisions in terms of s 32(2) of the LRA 1995 to renew and extend a collective agreement to non-parties. The court set aside the minister's notice to extend the agreement for several reasons. It found that material changes were made to the agreement after it had been ratified by the bargaining council and that the minister had therefore acted ultra vires s 32(3) and (5) by extending an agreement that had not been approved by the council. In addition, the minister had breached her duty to act fairly in compliance with ss 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 by failing to give objecting parties a fair opportunity to make representations before taking her decision to extend the agreement.

The applicants in *Plastics Convertors Association of SA & another v Metal & Engineering Industries Bargaining Council & others* (at 2081) approached the Labour Court to set aside the decision of the bargaining council in terms of s 32(1) of the LRA 1995 to request the Minister of Labour to extend a collective agreement to non-parties. The court noted that s 32 stipulates a number of jurisdictional facts that have to be present before a bargaining council can ask the minister to extend a collective agreement to nonparties. In particular, s 32(1)(b) requires that, at a meeting of the bargaining council, one or more registered employers' organisations whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council must vote in favour of the extension. In this matter the majoritarian requirements of s 32(1)(b) had not been met, and the decision of the council had therefore to be reviewed and set aside.

## Bargaining Council Agreements — Disputes between Council and Employers

In enforcement proceedings by a bargaining council, MIBCO, for recovery of amounts owing by two employers for contributions and levies on returns for a particular period, an arbitrator determined that an amount was owing by the employers. The employers paid the amount stipulated in the award, but MIBCO allocated the payments to the settlement of other returns, in effect leaving the returns covered by the award unpaid. In further enforcement proceedings, the employers objected to MIBCO's conduct and requested the arbitrator to direct it to comply with its main agreement and to allocate the payments to the correct returns. The arbitrator ruled that he had no jurisdiction. In an application for declaratory relief in terms of s 158(1)(a) of the LRA 1995, the Labour Court found that the mere fact that the arbitrator ruled that the employers should approach the 'courts' did not clothe it with jurisdiction. In addition, the court was

satisfied that the issue in dispute was a dispute about the interpretation of the MIBCO main agreement in terms of s 24 and the enforcement of that agreement in terms of s 33A. Once s 24 and/or s 33A applied to an issue in dispute, the issue had to be determined by way of arbitration. It followed that the court had no jurisdiction (*Sandton Body & Paint CC & another v Motor Industries Bargaining Council* at 2093).

## Bargaining Council — Appointment of Administrator

The applicant trade union approached the Labour Court for an order placing the MEIBC, which was under severe financial constraints arising from financial mismanagement and the misappropriation of funds, under administration. The court noted that the LRA 1995 makes no specific provision for a bargaining council to be placed under administration but only for its winding-up. Bargaining councils play a critical role in giving effect to the primary objects of the LRA and, in the court's view, a council falling on hard times ought to be rescued if possible instead of facing liquidation or winding-up in terms of s 59. Having found that it was empowered to appoint an administrator in order to save the MEIBC, the court was of the view that it would be appropriate to rely on the provisions of s 103A, relating to the appointment of administrators for trade unions and employers' organisations, as the basis for the appointment of an administrator of the MEIBC (*Solidarity v Metal & Engineering Industries Bargaining Council & others* at 2109).

## Organisational Rights — Minority Unions

The Labour Court had found that an employer cannot conclude a valid agreement on organisational rights with a minority union when it has already entered into a threshold agreement in terms of s 18 of the LRA with a majority union (see *Police & Prisons Civil Rights Union v Ledwaba NO & others* (2014) 35 ILJ 1037 (LC)). On appeal, the Labour Appeal Court noted that s 20 provides that 'nothing' in part A of chapter III precludes the conclusion of an agreement regulating organisational rights. On a plain reading of the provision, 'nothing' means nothing in the part, including a s 18(1) agreement. Therefore, even where a s 18(1) threshold agreement exists, this does not preclude the conclusion of a s 20 collective agreement between an employer and a minority union which has bargained for the organisational rights contained in that agreement (*SA Correctional Services Workers Union v Police & Prisons Civil Rights Union & others* at 2009).

In *Independent Municipal & Allied Trade Union v Commission for Conciliation, Mediation & Arbitration & others* (at 2027) the Labour Court noted that s 21(8C) empowers a commissioner to grant organisational rights to a trade union that does not meet the thresholds of representativeness established by the main agreement if the union represents 'a significant interest, or a substantial number of employees, in the workplace'. However, those considerations are 'subject to' the provisions of subsection (8) of s 21 as a whole. In this matter the commissioner had been compelled to consider the preemptory factors set out in s 21(8), which he had failed to do. His failure meant that he had misconceived the nature of the enquiry, and this constituted a reviewable irregularity.

## Contracts of Employment — Fixed-term Contracts

In two matters the employment of employees was terminated on expiry of their fixed-term contracts. The employees referred unfair dismissal disputes to the CCMA, relying on s 198B of the LRA 1995 and arguing that their fixed-term contracts were not valid, that they were deemed to be indefinitely employed and therefore that they had a reasonable expectation of permanent employment. In *National Education Health & Allied Workers Union on behalf of Madolo & others and Performing Arts Centre of the Free State* (at 2157) the commissioner found that the requirements of s 198B(6)(a) and (b) had been met. There was internal correspondence setting out the reason the services were required, the duration of the service and the rate of pay, all terms normally contained in a fixed-term contract, and the employer had justifiable reasons for conclusion of fixed-term contracts. In the circumstances, the employees' employment was not indefinite. However, in *SA Municipal Workers Union on behalf of Nkunzo & others and Pikitup Johannesburg* (at 2167) the commissioner found that, although the implementation of a new project was a justifiable reason for concluding fixed-term contracts when employing employees, in this instance the contracts made no reference to the new project nor that the contracts would terminate when the project was implemented. The commissioner accordingly found that the employees were unfairly dismissed and awarded them compensation.

## Skills Development Act 97 of 1998

The Minister of Higher Education & Training, relying on s 15 of the Skills Development Act 97 of 1998, appointed an administrator for a sector education and training authority, W&RSETA. In an application to review the minister's decision by SETA board members and unions, the Labour Court found that there had been insufficient evidence of financial mismanagement for the minister to act in terms of s 15. As the minister had failed to show that the necessary preconditions set out in s 15 existed in order to place W&RSETA under administration, the appointment of the administrator was set aside. This decision was upheld on appeal by the Labour Appeal Court (*Minister of Higher Education & Training & another v SA Commercial Catering & Allied Workers Union & others* at 1967).

## Public Service — Recovery of Erroneous Overpayment of Remuneration

The applicant public service employees were upgraded from salary level 7 to level 8 in terms of a job evaluation process. However, a few years later the department downgraded the employees to level 7 when it discovered an error in their earlier upgrading. The department informed the applicants that the overpayment of salary as a result of the erroneous upgrading would be recovered in terms of s 38 of the Public Service Act (Proc 103 of 1994). The applicants approached the Labour Court to review the decision in terms of s 158(1)(h) of the LRA 1995. The court agreed with the department's submission that, where an incorrect salary level, salary scale or reward is awarded to an employee, the consequence is that the relevant executing authority is obliged to correct it and that no discretion is exercised. However, the court did not accept that the executing authority did not take a decision but simply applied s 38 — before the executing authority applied s 38, a decision or some action was indeed taken to decide that the salary or salary level or salary scale was incorrect. Only once this was decided, s 38 was triggered.

The court therefore found that the applicants had to be given the opportunity to make representations concerning the downgrading of their salary levels (*Tshifhango & another v Minister of Justice & Correctional Services & others* at 2131).

## Resignation

The employee, a church leader, sent an email to an elder expressing his desire to resign. He later withdrew his resignation, but the church elders held him to his resignation. In unfair dismissal proceedings in the CCMA, the commissioner found that the church's constitution prescribed procedures for the resignation of its elders. As there was no labour legislation preventing parties in voluntary associations from concluding agreement on the specific method for dealing with resignations, the procedures prescribed in the church's constitution had to be followed. The commissioner found that, because those procedures had not been followed, the employee had not actually resigned and there had been no need for him to withdraw his resignation (*Harnden and Christian Centre (Abbotsford) East London* at 2140).

### *Quote of the Month:*

Not awarded.