

# HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

## Employment Equity Act 55 of 1998

The High Court found that, as there was no framework in place regulating the certification of psychological testing and other similar assessments by the Health Professions Council of SA, the president's decision to promulgate s 8(d) of the Employment Equity Act 55 of 1998, which required tests and assessments to be certified by the HPCSA, was irrational and failed the constitutional requirement of legality. The court therefore found that Proc 50 published in *Gazette* 37871 was null and void and of no force and effect to the extent that it brought s 8(d) into operation (*Association of Test Publishers of SA v President of the Republic of SA & others* at 2253).

## Unfair Dismissal — Compensation

A bargaining council arbitrator had upheld the employer's decision summarily to dismiss an employee without any form of hearing and had declined to grant any compensation for this procedural unfairness because of the gravity of the employee's misconduct. The Labour Appeal Court found that the employer's egregious disregard of the employee's right to a fair pre-dismissal hearing justified redress on a just and equitable basis by the arbitrator as a solatium for the loss of the right to a fair pre-dismissal procedure. It awarded the employee compensation equivalent to three months' remuneration for the procedurally unfair dismissal (*SA Medical Association on behalf of Pietz v Department of Health, Gauteng & others* at 2297).

## Unfair Dismissal — Reinstatement

A bargaining council arbitrator had found that the employee's misconduct did not warrant his dismissal and ordered that the employer reinstate him without backpay, effectively denying the employee of ten months' salary. On appeal, the Labour Appeal Court noted that, once the arbitrator had found that the sanction of dismissal was inappropriate, the employee had to be reinstated — this was the primary remedy. The arbitrator's further order reinstating the employee without backpay was a heavy financial sanction, but was not an unreasonable one (*Sasol Nitro v National Bargaining Council for the Chemical Industry & others* at 2322).

## Prescription

In *Compass Group SA (Pty) Ltd v Van Tonder & others* (2016) 37 ILJ 1413 (LC) the Labour Court found that it was bound by the Labour Appeal Court judgment in *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Ltd t/a Metrobus; Mazibuko v Concor Plant; Cellucity (Pty) Ltd v Communication Workers Union on behalf of Peters* (2016) 37 ILJ 413 (LAC), and had no option but to find that the arbitration award in this matter had prescribed, thereby depriving the employee of a compensation award. By the time the matter was heard by the Labour Appeal Court, the Constitutional Court had overruled that decision, and the court found that, whichever of the approaches set out by the CC was adopted, the compensation order contained in the arbitration award had not prescribed (*Van Tonder v Compass Group (Pty) Ltd & others* at 2329).

## CCMA — Jurisdiction

The Labour Appeal Court confirmed, in *James & another v Eskom Holdings SOC Ltd & others* (at 2269), that the CCMA's jurisdiction is determined by the pleaded case referred by the employee. It found therefore that an employee referring an unfair dismissal dispute to the CCMA cannot, after arbitration, abandon his dismissal dispute and claim that he was not dismissed.

## Public Service Employee — Deemed Dismissal

In *Gangaram v MEC for the Department of Health, KwaZulu-Natal & another* (at 2261) the Labour Appeal Court found that, as the public service employee had not been absent without permission, the jurisdictional requirements of s 17(3)(a) of the Public Service Act (Proc 103 of 1994) had not been satisfied, and that there had been no need for the employee to make representations for reinstatement in terms of s 17(3)(b).

## Local Government Employee — Disciplinary Proceedings

In *Matatiele Local Government v Shaik & others* (at 2280) the Labour Appeal Court gave meaning to 'became aware' and 'proceed' in clause 6.3 of the SALGBC disciplinary code collective agreement which provides that a municipality must 'proceed forthwith or as soon as reasonably possible with a disciplinary hearing but in any event not later than three months from the date upon which the employer became aware of the alleged misconduct'.

## Transfer of Business as Going Concern

The Labour Court found, in *Pillay & others v Mobile Telephone Networks (Pty) Ltd* (at 2360), that once it was established that there had been a transfer in accordance with s 197 of the LRA 1995, the employees were not required to tender their services to the new employer — their employment continued uninterrupted. It also declined to grant an order that the new employer provide the employees with contracts of employment as their conditions of employment remained unchanged.

In *SVA Security (Pty) Ltd v Makro (Pty) Ltd—A Division of Massmart & others* (at 2376) the Labour Court found that, where only the service of a contract had been taken over by the new service provider, this did not constitute a transfer within the ambit of s 197.

In *Tasima (Pty) Ltd v Road Traffic Management Corporation & others* (at 2385) the Labour Court found that the respondent corporation was estopped from refusing to accept the transfer of the employees' contracts where it had consistently accepted that the handover of Tasima's business was a transfer of a business as a going concern in terms of s 197 of the LRA 1995. It rejected the corporation's arguments that s 197 did not apply to public entities and that the business being transferred had to be a profitgenerating economic entity.

## Pre-dismissal Arbitration

The Labour Court set aside the dismissal of an employee following a predissmissal arbitration in terms of s 188A of the LRA 1995 and ordered that the matter be remitted for a new hearing. In further proceedings, the court found that the consequence of the earlier order was that the status quo ante was restored — the order retrospectively revived the contract of employment between the employee and the employer and, because the employee was on precautionary suspension at the time of the arbitration, he reverted to his status as an employee on precautionary suspension (*Sampson v SA Post Office SOC Ltd* at 2368).

## Demarcation Award

In *National Union of Mineworkers & another v Sylco Plant Hire (Pty) Ltd* (at 2346) the Labour Court declined to set aside a demarcation award in terms of which a commissioner had ruled that the employer, which hired out plant and equipment to various clients, was not engaged in the civil engineering industry and consequently did not fall within the jurisdiction of the Bargaining Council for the Civil Engineering Industry.

## Residual Unfair Labour Practice

The employee had been charged with one offence and been found guilty of a lesser offence, for which the disciplinary chairperson imposed a written warning. In unfair labour practice proceedings, a CCMA commissioner found that it had not been competent for the chairperson to impose a sanction in relation to an offence for which the employee was not charged. The written warning constituted an unfair labour practice, and was set aside (*Halse and Rhodes University* at 2403). However, in *National Union of Metalworkers of SA on behalf of Members and Kirk Marketing (Pty) Ltd* (at 2425), a CCMA commissioner found that the issuing of two final written warnings for failure to obey a lawful instruction and insubordination did not constitute an unfair labour practice. But he did find that the second warning, which was a ‘blanket’ warning, was contrary to the principles of fairness and progressive discipline. This warning was, therefore, upheld, but only in relation to offences of failure to obey lawful instructions and insubordination.

In *National Education Health & Allied Workers Union on behalf of Members and Beyond Zero* (at 2409) a CCMA commissioner found that the provision of cellular phones and an airtime allowance to the employees constituted a benefit in terms of s 186(2)(a) of the LRA 1995. Similarly, in *Hendricks and Imperial Logistics Refrigerated Services (Pty) Ltd* (at 2432), a bargaining council arbitrator found that a night out allowance constituted a benefit. She found however that the allowance paid to temporary employees differed from that paid to permanent employees, and that the employer had not acted arbitrarily and capriciously by changing the employee’s allowance when he chose to become a permanent employee.

In *National Education Health & Allied Workers Union on behalf of Members and Parliament of the Republic of SA* (at 2420) a CCMA commissioner confirmed that performance bonuses are discretionary and remain within the prerogative of the employer. He found that, in this matter, the employer had followed the procedure set out in its policy on the payment of performance bonuses, it had not acted maliciously and its conduct did not constitute an unfair labour practice.

## Practice and Procedure

The Labour Appeal Court found that the Labour Court had properly exercised its discretion to debar the employees from obtaining relief where there had been a 15-year delay in the prosecution of their unfair dismissal claim (*National Union of Metalworkers of SA & others v Paint & Ladders (Pty) Ltd & another* at 2285).

In *Boundary Spar Supermarkets (Pty) Ltd v Brown & others* (at 2337) the Labour Court restated the legal principles relating to the execution of writs and considered the meaning of ‘suspension’ and ‘stay’ of execution of writs.

*Quote of the Month:*

Sutherland JA in *Sasol Nitro v National Bargaining Council for the Chemical Industry & others* (2017) 38 *ILJ* 2322 (LAC), on the formulation of a litigant's complaints on review and in formulating the notice of appeal and heads of argument:

‘It is unhelpful to attack a decision by assaulting the reader with a fusillade consisting of every nit-picking point that the drafter’s imagination can conjure up and moreover duplicating the points by phrasing the same complaint slightly differently over and over again. A court requires a coherent focused articulation of the real issues, ie matters of substance that can support a plausible argument. Drowning the reader in detail with a multitude of petty points, artificially divided up into numerous separate paragraphs which inevitably overlap achieves two outcomes — to obfuscate the true issues and irritate the court. If such an approach serves to impress litigants, then litigants must be disabused by legal practitioners of their appetite for rambling, repetitive waffle. The watchwords in formulating all documents to be presented to a court ought to be brevity, lucidity and cogency.’