

# HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

## High Court — Jurisdiction

When the applicant municipal employee was excluded from the interview process for a vacant post by the municipality, he launched an urgent application in the High Court seeking an order directing the municipality to reinstate him as an interviewee. He founded his case on unfair discrimination, contending that his exclusion from the interview process constituted a breach of his constitutional right to pursue a career, trade or occupation of his choice. The court found that the unfair discrimination was sourced in the LRA 1995, and that the employee's disavowal of reliance on the LRA was irrelevant. The courts have cautioned against persistent attempts by practitioners to fashion cases to suit their client's choice of forum — it is impermissible for a litigant to raise a complaint of unfair discrimination, which is an area the legislature has made the subject of specialisation by specific courts, and then seek to disavow reliance on the provisions of the relevant legislation. The court found that it lacked jurisdiction to entertain the dispute (*Dlala v O R Tambo District Municipality & another* at 2457). In *SA Breweries (Pty) Ltd v Professional Transport & Allied Workers Union & another* (at 2463) the High Court was approached by SA Breweries for an urgent interdict to prevent the striking employees of truck owners contracted by SAB to deliver its beers to retail outlets from damaging or destroying its product. The court found that the dispute did not concern a strike as contemplated in s 68(1) of the LRA 1995 over which the Labour Court had exclusive jurisdiction. The court considered whether SAB was entitled to interfere in a labour dispute between members of the union and their employers if such a dispute resulted in a violent strike or protest which adversely affected the business operations

of SAB. It noted the relevant provisions of the Constitution 1996, especially s 23(2)(b) read with s 17, which provide for peaceful strike or protest action. This is to protect the right to be free from all forms of violence from either a public or private source provided for in s 12(1)(c) of the Constitution and to ensure that public and private property is not damaged or destroyed by those participating in a strike. From the evidence there was no doubt that the product of SAB had been destroyed on several occasions and that the striking employees were the culprits. SAB had been compelled to protect its product and had incurred substantial financial costs arising from the employment of a private security firm. The court found, therefore, that SAB was, by law, entitled to approach the court for relief against the union and its members.

### Strike — Withholding of Labour

In *Imperial Cargo Solutions (Pty) Ltd v SA Transport & Allied Workers Union & others* (at 2479) the Labour Appeal Court upheld a Labour Court judgment (see *Imperial Cargo Solutions (Pty) Ltd v SA Transport & Allied Workers Union & others* (2016) 37 ILJ 1908 (LC)) in which it found that, where employees withheld the labour that they had been obliged to perform in terms of a cancelled collective agreement, the withholding of labour did not constitute an unprotected strike.

### Employment Equity Act 55 of 1998 — Medical Testing of Employee

The Labour Appeal Court has confirmed the finding by the Labour Court, in *EWN v Pharmaco Distribution (Pty) Ltd* (2016) 37 ILJ 449 (LC), that an employer cannot rely on an employee's consent to medical testing to avoid the prohibition of medical testing provided for in s 7(1)(a)-(b) of the Employment Equity Act 55 of 1998. It also upheld the finding that the dismissal of the employee for refusal to undergo a medical examination which she would not have been required to undergo but for her bipolar condition was automatically unfair in terms of s 187(1)(f) of the LRA 1995 and that the employer's conduct in singling out the employee to undergo a psychiatric examination on account of her bipolar status amounted to unfair discrimination as contemplated in s 6 of the EEA. In relation to the award of damages for injuria, the court held that both the claim under the LRA and that under the EEA were for impairment of the employee's dignity arising from the self-same act of unfair discrimination against her on the grounds of her disability and that to award both non-patrimonial damages and compensation to the employee for the same wrongful conduct of the employer would not be just and equitable as it would amount to penalising the employer twice. The damages award for injuria was accordingly set aside, and the court determined R285,000 to be a just and equitable amount to award for compensation (*Pharmaco Distribution (Pty) Ltd v EWN* at 2496).

## Employment Equity Act 55 of 1998 — Unfair Discrimination — Pay Differentials

An employee claimed that she was paid less than employees in the same positions in other provinces and that this amounted to unfair discrimination on the ground of geographical location. Her claim was upheld by the Labour Court (see *Duma v Minister of Correctional Services & others* (2016) 37 ILJ 1135 (LC)). On appeal, the Labour Appeal Court found that an employee alleging discrimination on an arbitrary ground was required to establish a link between the arbitrary ground and the differentiation complained of. In this matter, there was no evidence to indicate that the basis for the differentiation was geography — an equally plausible reason for the differentiation was the work load of the employees in the other provinces. The decision of the Labour Court was therefore set aside (*Minister of Correctional Services & others v Duma* at 2487).

Similarly, CCMA commissioners in *Cekiso and Premier FMCG (Pty) Ltd* (at 2615) and *Kutumela & others and Pretoria Metal Pressings—A Division of Denel SOC Ltd* (at 2620) found that employees alleging discrimination on an arbitrary ground are required to establish a link between the arbitrary ground and the differentiation complained of. In *Cekiso*, where shunter drivers claimed that they were paid at different rates to other shunters who performed the same work, the commissioner found that length of service influenced the rate of pay, and that the differentiation was justified. In *Kutumela*, where machine operators claimed that they earned less than visual inspectors although they performed the same work, the commissioner found that the employees had led no evidence to prove any ground of discrimination and, even if they had done so, they had led no evidence as to how that ground related to a characteristic or attribute that affected their dignity.

The employees, section managers, claimed that their employer had unfairly discriminated against them by appointing new section managers at higher salaries. The employer contended that the new managers had been employed on an incorrect salary and that this had been rectified. The Labour Court noted that the employees did not rely on any listed ground of discrimination in s 6(1) of the Employment Equity Act 55 of 1998 or any analogous ground. Their case fell squarely within the ambit of ‘any other arbitrary ground’ which had been included by the recent amendment to s 6(1); they contended that this constituted a separate category of unfair discrimination, and that it was therefore not necessary to plead any specific arbitrary ground. The court, having considered the principles of interpretation, the Constitution 1996, especially the equality clause in s 9, and judicial and academic authorities on unfair discrimination, concluded that parliament did not purport to introduce a third category of grounds upon which an employee could challenge the conduct of an employer when it included the phrase ‘any other arbitrary ground’ in s 6(1). The effect of the amendment simply is that discrimination on any arbitrary ground affecting human dignity constitutes unfair discrimination. In the case of the listed grounds discrimination is presumed, and any other arbitrary ground that affects human dignity requires that the complainant must define the ground and has the burden of proof in terms of s 11(2). To the extent that in oral argument the employees sought to rely on ‘error’ as an arbitrary ground, they had failed to plead such ground. The court found that,

in any event, it was difficult to understand how an error that was subsequently corrected or rectified, and thereby extinguished, could constitute such a ground (*Ndudula & others v Metrorail—Prasa (Western Cape)* at 2565).

In both *Cekiso and Premier FMCG (Pty) Ltd* (at 2615) and *National Education Health & Allied Workers Union on behalf of Sinxo & others and Agricultural Research Council* (at 2629) CCMA commissioners considered the provisions of the Employment Equity Regulations 2014, especially the requirements for proving that differentiation amounts to unfair discrimination set out in regulation 7. In *NEHAWU on behalf of Sinxo*, where farm supervisors who were paid far less than farm foremen despite performing substantially the same work claimed that they had been unfairly discriminated against in terms of s 6(4) of the EEA, the commissioner found that the employer's differentiation based on qualifications was not rational and, given the historical inequality of South African education, constituted discrimination which was unfair.

The security guard, in *National Education Health & Allied Workers Union on behalf of Totyi and Airports Company SA (SOE)* (at 2637), contended that he was being paid at a lower rate than a fellow security guard despite the fact that they performed the same work. The CCMA commissioner found that the comparator security officer had previous service with the employer and required no training on reappointment. The differentiation was therefore rational and did not constitute unfair discrimination.

In *Zvigo and Society of Jesus in SA* (at 2645) the CCMA commissioner had to determine whether the work of the employee, a librarian, was similar to or of the same value as that of the comparator, a secretary, who was paid more than him. The commissioner objectively assessed the responsibility demanded of the work; the skills and qualifications; the physical, mental and emotional effort required to perform the work; and the conditions under which the work was performed, and found that the work performed by the employee did not require the same responsibility, skills or physical, mental or emotional effort as that of the comparator. The employee had therefore been unable to prove that he was performing substantially similar work or work of the same value. The employee's claim did not fall within the EEA and was dismissed.

### Dismissal — Fraud by Managerial Employee

In *Workforce Group v McLintock & others* (at 2517) the Labour Appeal Court found, contrary to the Labour Court on review, that the employee had not been coerced into committing fraud — he had done so in an attempt to exculpate himself from the financial mismanagement and fraudulent activities at the office he managed. The employee occupied a senior position which demanded integrity and trust. He had breached that trust in the form of conduct involving dishonesty; this breach went to the heart of the employment relationship and destroyed the relationship. The LAC therefore upheld the CCMA commissioner's award dismissing the employee.

## Dismissal — Incapacity

The employee, who was employed at a coal mine, suffered from a lung disease. Two physicians recommended that he could not work in a dusty area. Following an incapacity hearing, the employee's employment was terminated. A CCMA commissioner ordered the employer mine to reinstate the employee in an alternative position. On review, the Labour Court considered item 11 of the Code of Good Practice: Dismissal (schedule 8 to the LRA 1995), which provides that an employee must consider suitable alternative positions before terminating an employee's employment for incapacity. As the whole mine was declared to be a dusty area by the Department of Mineral Resources, the commissioner's order reinstating the employee in a position in a dusty area was not an appropriate remedy. The court accordingly awarded the employee nine months' compensation (*Exarro Coal (Pty) Ltd t/a Grootgeluk Coal Mine v Maduma & others* at 2531).

In *Parmalat SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 2586) the Labour Court also considered the requirement of 'suitable alternative employment' in item 11 of the code. It found that, where the employee had already indicated that he was unwilling to be employed in a position which he regarded as inferior to his current position, there was no rational basis for the CCMA commissioner to conclude that that position was suitable alternative employment. It therefore set aside the award of reinstatement and awarded the employee six months' compensation.

The employee, a financial services representative, had failed to meet the requirements to perform financial services functions in terms of the Financial Advisory Intermediary Services Act 37 of 2002, and the employer bank held an incapacity hearing, following which his employment with the bank was terminated. A CCMA commissioner found that, in terms of the Code of Good Practice: Dismissal, incapacity meant incapacity on the grounds of ill-health or injury only. He found further that the matter should have been dealt with as a dismissal for operational requirements; and reinstated the employee. On review, the Labour Court found that there was clear authority that incapacity was not confined to incapacity caused by ill-health or injury. In this matter, a statutory provision required that the employee obtain a qualification, he did not meet this requirement, and consequently the employer was not permitted to employ the employee. The court found further that the commissioner had committed an error of law in finding that the dismissal was based on operational requirements. Furthermore, the commissioner was not at liberty to change the basis of the employee's dismissal from incapacity to operational requirements where the law and the facts indicated that a dismissal for incapacity was appropriate. The court accordingly found that, on the facts, the errors in law by the commissioner resulted in his failure to determine whether there was a fair substantive reason for the bank to dismiss the employee. This constituted a reviewable irregularity. Furthermore, by ordering the reinstatement of the employee after the employee had requested compensation, the commissioner acted ultra vires his powers. The award was set aside (*First National Bank—A Division of First Rand Bank Ltd v Commission for Conciliation, Mediation & Arbitration & others* at 2545).

## Arbitration Awards — Review — Security

In *Rustenburg Local Municipality v SA Local Government Bargaining Council & others* (at 2596) the Labour Court interpreted the provisions of the newly introduced s 145(7) and (8) of the LRA 1995 which provide for the stay of enforcement of arbitration awards pending review on the payment of security. It considered the discretion exercised by the court as contemplated in s 145(3), and noted that, once security has been provided, this automatically suspends the arbitration award and stays enforcement of any writ. The court found further that all employers — public or private — are subject to the same requirements, and that employers that are public entities are not exonerated from the provision of security.

## Practice and Procedure

The Labour Appeal Court had to consider whether a review was appropriate when a rescission application in terms of s 144 of the LRA 1995 was available to an applicant in respect of a default award. It found that, although the conventional approach of a court of review to decisions of a court or administrative body is that internal remedies should be exhausted and piecemeal reviews are to be avoided, a court may intervene in medias res where the interests of justice require it; although it is to be used sparingly and only in exceptional circumstances. The court found that it could exercise review powers in relation to a default award, particularly since s 144 is limited in its scope and does not allow for the correction of every mistake or irregularity (*Bloem Water Board v Nthako NO & others* at 2470).

### *Quote of the Month:*

Not awarded.