

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Restraint of Trade Undertakings

The High Court has confirmed that a contract of employment can only contain terms provided for in the Basic Conditions of Employment Act 75 of 1997 or terms more favourable to the employee. Thus, if a restraint of trade undertaking is less favourable to an employee than the terms provided for in the BCEA, it cannot be a term of a contract and is, therefore, not transferrable by operation of law under s 197 of the LRA 1995. In the same matter the court considered restraint of trade undertakings within the context of the constitutional and statutory protections afforded to employees and found that, ultimately, the reasonableness of a restraint is determined with reference to public policy (*Laser Function (Pty) Ltd v Fick* at 2675).

In *TIBMS (Pty) Ltd t/a Halo Underground Lighting Systems v Knight & another* (at 2721) the Labour Appeal Court upheld a Labour Court decision dismissing an application to enforce a restraint of trade agreement in circumstances where, despite the fact that the employee admitted to hijacking the employer's business, the employer failed to produce a signed restraint of trade agreement between the parties.

In *Aquatan (Pty) Ltd v Jansen van Vuuren & another* (at 2730) the Labour Court confirmed that an employee cannot be interdicted from taking away his experience, skills or knowledge, even if those are acquired as a result of training by the employer. The court found, regarding the duration of a restraint, that it will not consider whether a shorter period than that stipulated in the agreement is reasonable if the employer fails to set out a proper basis for the partial enforcement or reading down of the duration. In *Ecolab (Pty) Ltd v Thoabala & another* (at 2741) the Labour Court found that, although there is an inherent urgency in disputes concerning breaches of restraint of trade undertakings, there is nothing in such disputes that makes them deserving of more urgent attention than any other urgent disputes before the court — all disputes coming before the court on an urgent basis must be treated equally, and consequently the party alleging a breach of a restraint is not indemnified from satisfying the requirements in rule 8 of the Labour Court Rules.

Settlement Agreement

The Labour Appeal Court, in *City of Johannesburg Metropolitan Municipality & others v Independent Municipal & Allied Trade Union & others* (at 2695), found that, although employers' organisations are empowered to bind members, where an employers' organisation has not authorised its representative to enter into a settlement agreement, neither the organisation nor its members are bound by that agreement.

Separation Agreement

In unfair dismissal proceedings before a CCMA commissioner the employee contended that she had entered into a separation agreement under duress. The commissioner confirmed that a voluntary mutual separation agreement between two parties to end an employment contract does not fall within the meaning of a dismissal in s 186(1) of the LRA 1995. He also found that, in this matter, there had been negotiations between the employer and the employee to end the relationship and that the employee had signed the separation agreement after being promised two months' salary. There was no evidence of a threat of considerable evil or reasonable fear on the part of the employee. There had, therefore, been no duress and the employee was bound by the separation agreement (*Sithole and Sefikile Logistics CC* at 2876).

Dismissal — Dishonesty

A managing director was dismissed for receiving information relating to financial transactions on the company's bank account from a bank. The Labour Appeal Court found that the evidence revealed that the director had received the information because of an error by the bank. It found that the CCMA commissioner had, therefore, not been unreasonable to conclude that the director's dismissal for dishonesty was not justified (*Moen v Qube Systems (Pty) Ltd & others* at 2712).

An employee had misrepresented his qualification when applying for employment and, four years later when the misrepresentation was discovered, he was dismissed. The Labour Court, confirming that honesty and integrity are paramount in the employment relationship, found that dismissal was warranted (*LTE Consulting (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* at 2787).

Unfair Discrimination — Pregnancy

In *Impala Platinum Ltd v Jonase & others* (at 2754), a CCMA commissioner upheld two pregnant employees' complaint that they had been treated differently to other pregnant women and that this constituted unfair discrimination based on pregnancy. On appeal in terms of s 10(8) of the Employment Equity Act 55 of 1998, the Labour Court found that the treatment of some pregnant women compared to other pregnant women could not constitute discrimination based on pregnancy — the employees were not treated differently because they were pregnant; they were treated differently from some other pregnant employees who were given alternative employment because they did not have the requisite skills.

Resignation

The employee resigned and then participated in a disciplinary hearing during her notice period. She was found not guilty and attempted to retract her resignation. The employer refused to accept the retraction and terminated her employment on expiry of the notice period. In unfair dismissal proceedings, the CCMA commissioner found that, once the employee elected to serve her notice period, she was bound to that election. The commissioner found further that the employer had not been obliged to accept the retraction of the resignation, that the resignation was binding, and consequently that the employee had not been dismissed (*Bawsi Agricultural Union of SA on behalf of Hansen and Standard Bank of SA Ltd* at 2847).

The employee had resigned on notice, but the employer, invoking the Basic Conditions of Employment Act 75 of 1997, prevented the employee from tendering notice longer than one week. In unfair dismissal proceedings, the CCMA commissioner found that there was nothing in the BCEA which prevented an employee from tendering notice longer than the statutory minimum and that there was no signed contract of employment setting out a notice period. The employer's unilateral alteration of the employee's termination date therefore constituted a dismissal (*Harmse and Consolidated Employers' Organisation of SA* at 2854). The employee, on the advice of a manager, had erroneously resigned from an existing post in order to take up a promotional position with the same employer. The employer terminated her services, despite the fact that she had received and accepted an offer of appointment to the new post while still serving her notice. A CCMA commissioner found that the termination of her services constituted an unfair dismissal (*Scharneck and Life Healthcare* at 2869).

Transfer of Business as Going Concern

In *Invula Quality Protection & others v University of South Africa* (at 2763) the Labour Court confirmed that the substance and not the form of the transaction is relevant to determine whether there has been a transfer of a business as a going concern for purposes of s 197 of the LRA 1995. It found that, in this matter where a security service contract had been terminated and the activities previously performed by the contractor were insourced, s 197 had not been triggered. Similarly, in *Sisonke Partnership t/a DSV Healthcare v Medtronic SA (Pty) Ltd & others* (at 2812), the court found that where a company had merely internalised a service previously outsourced to a logistics company, this did not constitute the transfer of the whole or part of the business and s 197 had not been triggered.

Strikes

Employees of a temporary employment service sought an urgent interdict against changes to terms and conditions of employment by the TES pending the outcome of a dispute concerning their employment status referred to arbitration under s 198D of the LRA 1995. The purpose of the interdict was to allow the employees of the TES to engage in a primary strike against the client and also to allow other employees of the client to participate in the strike. The Labour Court found that an alternative remedy, in the form of a secondary strike by the employees of the client, was available, and refused the interdict (*Nyambi & others v H C Shaik Investments CC & another* at 2806).

A union had emailed notice of a strike at midnight on Saturday for the commencement of a strike on Tuesday morning, knowing that the employer was closed over the weekend and would only read the notice on Monday morning. The Labour Court found that a strike notice in terms of s 64(1)(b) of the LRA 1995 had to be given in a manner that let the employer know that the strike would commence at least 48 hours after the notice was delivered. The union in this matter had deliberately given less than 48 hours' notice in breach of the section, and the strike was therefore unprotected (*Swartland Investments (Pty) Ltd v National Union of Mineworkers & others* at 2821).

Basic Conditions of Employment Act 75 of 1997

In a claim for overtime worked by an employee, the Labour Court found that an instruction not to leave work until a task was completed was tantamount to an instruction to work overtime. It found further that, where the employer had failed to keep proper records as required by the BCEA, the court had to undertake its own calculation, which had to be fair to the employee (*Venter v Symington & De Kok* at 2828).

Disciplinary Code and Procedure

Where a public service employee sought an urgent interim interdict to postpone a disciplinary hearing pending the review of procedural rulings by the chairperson of the disciplinary hearing, the court confirmed that such a review was only permissible under s 158(1)(h) of the LRA 1995 where the LRA did not provide another remedy. It found further that it would only intervene in exceptional cases and that the employee had to establish a prima facie case for the review (*Magoda v Director-General of Rural Development & Land Reform & another* at 2795).

Practice and Procedure

The Labour Court restated the principles applicable when considering an application in terms of the common law for the rescission of a default judgment on the basis that the order had been obtained by fraud (*Independent Municipal & Allied Trade Union on behalf of Erasmus & another v City of Johannesburg & another* at 2774).

Although the parties had agreed to a postponement of an arbitration hearing, the CCMA commissioner refused to grant it because the notice of set-down had been timeously issued. On review, the Labour Court found that the commissioner's failure to assess prejudice had been a material misdirection which constituted a material defect in the proceedings. The award was reviewed and set aside (*Wade Walker (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* at 2842).

Quote of the Month:

Not awarded.