

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Pension Fund Rules

The High Court, in *SA Municipal Workers Union National Provident Fund v Umzimkhulu Local Municipality & others* (at 121), found that a pension fund rule which prohibited the withdrawal from the fund by a member while in service did not prevent the member from transferring his or her membership to another fund which offered better benefits.

Skills Development Act 97 of 1998 — Validity of Grant Regulations

In *Minister of Higher Education & Training & another v Business Unity SA & another* (at 160) the Labour Appeal Court confirmed the Labour Court's finding that the SETA Grant Regulations 2012 were invalid. It found that the minister had failed to comply with the mandatory obligation to consult with the National Skills Authority before signing and promulgating the regulations thus rendering the regulations reviewable.

Jurisdiction — Labour Court

The employees relied on the incorporation of the terms of a collective agreement into their contracts of employment to approach the Labour Court in terms of s 77(3) of the Basic Conditions of Employment Act 75 of 1997. The court found that the dispute concerned minimum wages and conditions of employment negotiated and agreed at the bargaining council and was not a dispute concerning payment of what was contractually agreed to between the parties or incorporated into the employees' individual contracts by virtue of s 23(3) of the LRA 1995. The employees had to follow the special dispute-resolution procedures in the collective agreement and the enforcement procedures of s 33A of the LRA. The court had no jurisdiction to adjudicate the dispute. This judgment was upheld on appeal to the Labour Appeal Court (*Rukwya & others v Kitchen Bar Restaurant* at 180).

Unfair Dismissal — Reinstatement

In *Glencore Holdings (Pty) Ltd & another v Sibeko & others* (at 138) the Labour Appeal Court, having confirmed that reinstatement is the primary remedy for a substantively unfair dismissal, found that a CCMA commissioner is not entitled to sanction an employee's conduct at the arbitration by denying him reinstatement.

Retrenchment

In *SA Breweries (Pty) Ltd v Louw* (at 189) the Labour Appeal Court found that it was legitimate for an employer to institute a competitive process for appointment to a newly created post in its restructured organisation in an attempt to avoid dismissal of a relocated employee. It found further that the assessment criteria for appointment to a new post in an attempt to avoid dismissal of the relocated employee are not selection criteria as envisaged by s 189 of the LRA 1995.

In *Woolworths (Pty) Ltd v SA Commercial Catering & Allied Workers Union & others* (at 222) the Labour Appeal Court found that, where judgment is granted in respect of the substantive fairness of a s 189A retrenchment, an order granting relief for procedural fairness is no longer competent — the fact that the parties may have agreed to try both issues simultaneously and that the Labour Court sanctioned that agreement is of no legal consequence.

Strike — Unprotected Strike

The Labour Appeal Court has found that the dismissal of strikers who participate in an unprotected strike of short duration may be justified — it is not the duration of the strike, but the conduct of the participants in the strike which determines whether dismissal is appropriate in the circumstances. In this matter the employees had erroneously relied on the assurances of their trade union representatives that the strike was legal. Their conduct had thus not been in deliberate defiance of their employer's instruction, and their participation in the unprotected strike of short duration was not sufficiently serious to warrant dismissal (*SA Commercial Catering & Allied Workers on behalf of Mokebe & others v Pick 'n Pay Retailers* at 201).

Arbitration Proceedings — Conduct of Proceedings

In *Grindrod Logistics (Pty) Ltd v SA Transport & Allied Workers Union on behalf of Kgwele & others* (at 144), where the employee contended that the CCMA commissioner had been biased, the Labour Appeal Court found that, although the purpose of dispensing justice would be defeated if a commissioner surreptitiously hinted to a party that its case was incomplete, a commissioner was empowered to subpoena any person who might be able to give information that could help to resolve the dispute. When alleging bias, the employee had to show that the commissioner had acted mala fide and in breach of his duties so as to afford the employer an unfair advantage. If the review court found the commissioner to be biased, it had to remit the dispute to the CCMA and could not consider the case on the merits.

In an unfair labour practice dispute the parties had agreed not to lead oral evidence and to proceed by way of documentary evidence, submissions and argument. The bargaining council arbitrator, relying on this agreement, found in favour of the employees. On review the Labour Court found that in circumstances where the parties had decided to proceed without oral evidence, the commissioner ought to have ensured that a stated case was concluded. The agreement concluded by the parties was no substitute for the hearing of oral evidence, and fell dismally short of a stated case, which would have constituted a substitute therefor. As a result, the arbitrator had not placed himself in a position fully and fairly to resolve the dispute, and thereby deprived the employer of its right to procedurally fair administrative action (a patent gross irregularity), which gave rise to a review irrespective of the merits of the outcome of the award (*Department of Home Affairs v General Public Service Sectoral Bargaining Council & others* at 248).

Enquiry in terms of s 188A of LRA 1995

In *Msaqala v Transnet SOC Ltd & others* (at 259) the Labour Court considered the purpose of an enquiry conducted by an arbitrator in terms of s 188A of the LRA 1995, and found that the arbitrator does not sit as the employer's agent or representative; he or she is expected to discharge a statutory function by the exercise of statutory powers subject to the statutory criteria of fairness. Thus, when an arbitrator makes his ruling, it cannot be said that the ruling was made by the employer and it is consequently not reviewable under s 158(1)(h).

Disciplinary Penalty

The employee was dismissed for misconduct and the internal appeal chairperson overturned the dismissal. The employer declined to follow the appeal decision and dismissed the employee. In unfair dismissal proceedings the CCMA commissioner found that the appeal chairperson was empowered by the disciplinary code only to make recommendations and lacked final decision-making authority. The commissioner accordingly upheld the dismissal of the employee (*Sivalingam and SA Forestry Company (SOC) Ltd* at 279).

Contract of Employment

The employee's contract of employment required her to provide the original certificates of her qualifications. When she failed to do so, the employer requested her consent to submit to the SA Qualifications Authority for verification of her qualifications. The employer then dismissed her for failing to provide the original certificates. In unfair dismissal proceedings the CCMA commissioner found that the consent to verification by SAQA constituted a new term and condition and the employer was deemed to have waived compliance with the condition requiring original certificates (*Mabuza and National Youth Development Agency* at 263).

In *Naidoo and Robertson's Ventilation Industries* (at 285) a bargaining council arbitrator found that the employer was estopped from disputing that a supervisor had ostensible authority to employ the employee. A contract of employment therefore existed between the parties.

Costs — Labour Court

Where the SABC, its chief operating officer and another official had acted with reckless disregard when deciding to dismiss several employees and persisting in their opposition to matters in the face of a High Court interdict to which the SABC had consented, the Labour Court found that the officials were responsible to pay the costs jointly and severally with the SABC (*Broadcasting Electronic Media & Allied Workers Union & others v SA Broadcasting Corporation SOC Ltd & others; Solidarity & others v SA Broadcasting Corporation SOC Ltd & others* at 241).

Practice and Procedure

Where a review application has been filed under s 158(1)(h) of the LRA 1995, which requires that the application has to be brought within a ‘reasonable time’, the Labour Court cannot fix a certain time, for instance the six weeks provided for in s 145, which is regarded to be a reasonable time, nor can the court insist that an application for condonation should be made after a specific time — the application for condonation has to be made when the delay is unreasonable and must be made at the earliest opportunity (*G4S Secure Solutions (SA) (Pty) Ltd v Gunqubele NO & others* at 131).

In *SA Breweries (Pty) Ltd v Louw* (at 189) the Labour Appeal Court reiterated the nature and purpose of a pretrial minute.

Quote of the Month:

Sutherland JA in *SA Breweries (Pty) Ltd v Louw* (2018) 39 ILJ 189 (LAC):

‘To state the obvious, litigation is complex. Among the duties of legal practitioners is to conduct cases in a manner that is coherent, free from ambiguity and free from prolixity. True enough, the holy grail of translating what is complex into simplicity is not always attainable, but the ground rules are irrefragible: say what you mean, mean what you say and never hide a part of the case by a resort to linguistic obscurities. The norm of a fair trial means each side being given unambiguous warning of the case they are to meet. Moreover, these requirements are not mere civilities as between adversaries; the court too, is dependent upon the fruits of clarity and certainty to know what question is to be decided and to be presented only with admissible evidence that is relevant to that question. Making up one’s case as you go along is an anathema to orderly litigation and cannot be tolerated by a court. Counsel’s duty of diligence demands an approach to litigation which best assists a court to decide questions and no compromise is appropriate.’