

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Public Service Employees — Recovery of Overpayments

The Constitutional Court has found s 38(2)(b)(i) of the Public Service Act (Proc 103 of 1994), which provides for the recovery of erroneous overpayments of remuneration, to be unconstitutional. It held that the section, which allows the deduction of incorrect payments without due process or the employee's knowledge or without agreement, permitted unfettered self-help in violation of the legality principle in s 1(c) of the Constitution 1996 (*Public Servants Association on behalf of Ubogu v Head of the Department of Health, Gauteng & others; Head of the Department of Health, Gauteng & another v Public Servants Association on behalf of Ubogu* at 337).

Basic Conditions of Employment Act 75 of 1997 — Pregnant Employees

In *Manyetsa v New Kleinfontein Gold Mine (Pty) Ltd* (at 415) the Labour Court found that the employer mine's policy providing for extended unpaid maternity leave if suitable alternative risk-free work was not available for a pregnant employee working in a high-risk area complied with the provisions of s 26(2) of the Basic Conditions of Employment Act 75 of 1997. The court also found that the policy did not discriminate unfairly on the grounds of pregnancy or race against such employees in contravention of the Employment Equity Act 55 of 1998.

Pension Funds

The Constitutional Court has upheld the validity of the KwaZulu-Natal pension fund regulations, which provide for the compulsory membership by local authorities and their employees of four KZN pension/provident funds (*Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) & others* at 311).

Dismissal — Deemed Dismissal of Public Service Employee

The public service employee had been absent without authorisation for a period exceeding one month and when he returned he was allowed to resume work and was remunerated for a period of 11 months before the employer invoked the provisions of s 17(3)(a) of the Public Service Act (Proc 103 of 1994). The Labour Appeal Court found that, in accepting the employee's tender of performance and remunerating him on his return to work, the employer implicitly reinstated the employee. Following his reinstatement, the employer was not entitled to rely on the deemed dismissal provision in s 17(3)(a) to indicate that the employee's employment had been terminated by operation of law (*Ramonetha v Department of Roads & Transport, Limpopo & another* at 384).

Dismissal — Unprotected Strike Action

In *SA Commercial Catering & Allied Workers Union & others v Sun City* (at 436) the Labour Court upheld the dismissal of three shop stewards by Sun City for their participation in an unprotected strike. It found that the employees could not justify their conduct on the basis that Sun City had not done enough in relation to employee complaints relating to the conduct of the Gupta family and their guests at a wedding held at Sun City — that issue had already been dealt with by Sun City when the employees later embarked on deliberate strike action aimed at causing major disruption and embarrassment to Sun City. The court also found that Sun City had not acted capriciously when it only dismissed the three shop stewards and not other shop stewards who also participated in the unprotected strike — the others had not been identified and there was no evidence against them.

Dismissal — Foreign Employee Without Work Permit

In *Sithole v Metal & Engineering Industries Bargaining Council & others* (at 472) the Labour Court confirmed that, although s 38(1) of the Immigration Act 13 of 2002 prohibits the employment of foreigners who do not have valid work permits, s 38(1) does not shield an employer who knowingly or unknowingly employs a person in breach of s 38(1) from the legal consequences of terminating such employee's contract of employment.

Dismissal — Racist Comments on Facebook

In *African Meat Industry & Allied Trade Union on behalf of Makhoba and Clover SA (Pty) Ltd* (at 477) a CCMA commissioner upheld the dismissal of an employee who posted a comment on a Facebook page calling for all white people to be killed. The commissioner found that the comment constituted a serious offence and that, although it occurred outside the workplace, the employer had a sufficient and legitimate interest to discipline the employee.

Dismissal — Attempted Murder

In *National Union of Metalworkers of SA on behalf of Khumalo & others and Artav Steel (Pty) Ltd* (at 496) a bargaining council arbitrator, relying on direct and circumstantial evidence which supported a finding of guilt of the three employees, upheld their dismissal for engaging in a plot to kill their supervisor.

Disciplinary Penalty

Where an employee had been dismissed after she engaged in an aggressive public altercation with the sales representative of a competitor who criticised the products of her employer, a CCMA commissioner found that the sanction of dismissal was not appropriate in the circumstances (*Theunissen and Unilever SA (Pty) Ltd* at 484). Similarly, in *Mthembu and Key Vehicle Management* (at 490), a bargaining council arbitrator found that the dismissal of an employee who had used dagga during working hours was not appropriate. He found that the employer's disciplinary code did not have a zero-tolerance approach to the use of dagga; that the courts were moving towards social tolerance of the personal use of dagga; and that the employee had shown remorse.

Local Authority — Municipal Manager's Powers

The Labour Court has found that, although a municipal manager does not require a resolution of the municipal council to depose to a founding affidavit in litigation on behalf of the municipality, a resolution of the council — or in the absence of a resolution, written delegation — is required to authorise the municipal manager to institute litigation on behalf of the municipality (*Magodongo v Khara Hais Municipality & others* at 406).

Compensation

In *Billion Group (Pty) Ltd v Mosheshe & others* (at 368) the Labour Appeal Court confirmed that, where a fixed-term contract has been terminated before its expiry, the award of compensation is limited to the remainder of the contract term.

In *Gordon v J P Morgan Equities SA (Pty) Ltd & others* (at 393) the Labour Court found that a CCMA commissioner had properly exercised his discretion when he did not award compensation to an unfairly dismissed employee who did not ask for compensation.

Review of CCMA and Bargaining Council Arbitration Awards

In *Gordon v J P Morgan Equities SA (Pty) Ltd & others* (at 393) the Labour Court found that the CCMA commissioner had not denied the employee of a fair hearing when she fell asleep during the arbitration proceedings — her momentary lapse in concentration had not been prejudicial to the employee.

Review of Private Arbitration Awards

The Labour Court has confirmed that the test for review of private arbitration awards is that set out in *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA). By agreeing to private arbitration, the parties are limited to the grounds for review set out in s 33(1) of the Arbitration Act 42 of 1964; and the legal principles applicable to reviews in terms of s 145 and s 158(1)(g) of the LRA 1995 are not applicable (*SA Police Service v Erasmus & another* at 460).

Practice and Procedure

In *Minister of Public Service & Administration & another v Public Servants Association on behalf of Makwela & others* (at 376) the Labour Appeal Court confirmed that a party wishing to be joined in legal proceedings must have a direct and substantial interest to be a ‘necessary’ or ‘affected’ party or must have a legal right at stake in the dispute. It found that, in the matter before it where the minister applied for the rescission of an award in terms of s 144 of the LRA 1995, the award had not been erroneously granted as the minister, in whose absence it was granted, was not a necessary or affected party.

The Labour Court has found that, where a deponent did not sign an affidavit in full on the last page, but merely initialled every page in the presence of the commissioner of oaths, the affidavit complied substantially with the Regulations Governing the Administering of an Oath or Affirmation (*Magodongo v Khara Hais Municipality & others* at 406).

Quote of the Month:

Arbitrator Lyster in *National Union of Metalworkers of SA on behalf of Khumalo & others and Artav Steel (Pty) Ltd* (2018) 39 ILJ 496 (MIBCO), when considering the dismissal of three employees for plotting to kill their supervisor:

‘The shocking and brutal events which are summarised ... have their genesis in poverty, violence, patronage, resentment, jealousy and impunity, combining to tell a peculiarly tragic South African tale. The central figure, Michael Mtungwa, from a humble rural background, achieved a position of some seniority and authority in the steel factory in which he works. He used his influence to obtain jobs for relatives and acquaintances from his home town, and became their supervisor. His version is that they resented the authority he wielded over them, feared that in time he would cause them to lose their jobs, and so decided to kill him.’