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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Contract of Employment — Fixed-term Contract

In *Zungu v Premier, Province of KwaZulu-Natal & another* (2017) 38 *ILJ* 1644 (LAC), the employee claimed that she had a legitimate expectation of renewal of her fixed-term contract premised on the recommendation of a selection panel which the premier of the province was obliged to follow, and that his refusal to follow the recommendation was unlawful. In the Labour Appeal Court's view, this dispute fell squarely within the realm of s 186(1)*(b)* of the LRA 1995 — characterising the dispute as having other characteristics too did not dispel the validity of the finding that it fell within the purview of s 186(1)*(b)*. The legislation contemplated that a claim that a fixed-term contract be renewed on the grounds of a legitimate expectation was a species of 'dismissal', as defined in s 186, and was regulated by s 191 to be within the exclusive jurisdiction of the CCMA. The court therefore upheld the Labour Court's decision that it had no jurisdiction. This decision was upheld by the Constitutional Court (*Zungu v Premier of the Province of KwaZulu-Natal & others* at 523).

A CCMA commissioner found that the termination of fixed-term contracts linked to a particular project that the employer had with a client did not constitute a dismissal of the employees as contemplated in s 186(1)*(a)* of the LRA 1995 (*Klopper & others and Sabela Projects (Pty) Ltd & another* at 676).

Contract of Employment — Repudiation

In *Septoo v City of Johannesburg* (at 580) the Labour Appeal Court confirmed that when a party repudiates a contract, the other party has an election to either accept the repudiation and seek damages or refuse the repudiation and seek specific performance. In this matter, where the employer had repudiated the employee's first contract of employment, the employee accepted the repudiation and entered into a second contract in terms of which she performed until her resignation. She could not later claim specific performance of the first contract. The court accordingly agreed with the Labour Court's order granting the employer absolution from the instance.

Retrenchment — Large-scale Retrenchment — Procedural Fairness

In *Edcon Ltd v Steenkamp & others* (at 531), the Labour Appeal Court noted the purpose and functioning of an application in terms of s 189A(13) of the LRA 1995 — it is a procedure designed the enable the Labour Court urgently to intervene in a large-scale retrenchment to ensure that a fair procedure is followed. The procedure exists to oversee the process of retrenchment while it is still taking place or shortly thereafter. The remedy of compensation provided for in s 189A(13)*(d)* is a last resort backup where the remedies available in paras *(a)*, *(b)* and *(c)* are not appropriate.

The Labour Court, in *Association of Mineworkers & Construction Union on behalf of Employees v Patcon Construction & Civil Engineering Contractors (Pty) Ltd* (at 586), also restated the principles applicable to the remedies available in terms of s 189A(13)*(a)*-*(d)* of the LRA 1995. In this matter the court found that no meaningful consultation had taken place before certain employees were retrenched, and that they had to be awarded compensation in terms of s 189A(13)*(d)*. Regarding the balance of the employees who still faced the prospect of retrenchment, the court, relying on s 189A(13)*(a)*-*(b)*, interdicted the employer from retrenching them for a limited period during which time several meetings had to be held to try to reach consensus on the issues listed in s 189(2).

Settlement Agreement

The Labour Appeal Court refused to make a settlement agreement an order of court in terms of s 158(1)*(c)* of the LRA 1995 where it found that no settlement agreement had in fact been entered into (*Minister of Justice & Constitutional Development v Myburgh & others* at 553).

The Labour Court refused to make a settlement agreement an order of court in terms of s 158(1)*(c)* of the LRA 1995 where it was clear that the arbitrator who had made the agreement an arbitration award had included a term that never formed part of the settlement agreement (*Machabe v Ekurhuleni Metropolitan Municipality* at 638).

Strikes — Violent Conduct during Protected Strikes

The Labour Court had granted an order interdicting unlawful and violent conduct during a protected strike by AMCU members at the employer's premises. In subsequent contempt proceedings, the court was satisfied that the employees had acted in concert with a common purpose, and they were all accountable for violation of the court order — only employees who came forward to provide explanations exonerating themselves could not be held in contempt. The court found further that the union had not complied with its obligations in terms of the order — it had merely informed the striking employees of the order and then washed its hands of the matter. The court found that both the union and the striking employees had acted wilfully and mala fide in breach of the court interdict. A fine of R1 million suspended for three years was imposed on the union and a fine of R1,000 was imposed on each employee to be deducted directly from his or her wages (*KPMM Road & Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union & others* at 609).

Dismissal — Derivative Misconduct

The Labour Court, based on the principle of derivative misconduct, found that the dismissal of employees by PRASA had been substantively fair. However, on appeal, the Labour Appeal Court found that the court a quo's reliance on the principle was misplaced. PRASA had failed to prove that the employees knew or had knowledge of train burnings during a protected strike or of the identity of persons involved in the misconduct, and failed to disclose this knowledge or take reasonable steps to help PRASA to acquire the knowledge. The court found that the employees had in fact been dismissed for 'collective misconduct' — a notion that was wholly repugnant to the law, not only because it ran counter to the tenets of natural justice but also because it was incompatible with the established principle of innocent until proven guilty (*National Transport Movement & others v Passenger Rail Agency of SA Ltd* at 560).

Dismissal — Incapacity — Ill-health

In *Parexel International (Pty) Ltd v Chakane NO & others* (at 644) the Labour Court reiterated that an employer is obliged to follow the guidelines set out in items 10 and 11 of the Code of Good Practice: Dismissal when determining whether to dismiss an employee for incapacity arising from ill-health.

Disciplinary Code and Procedure

A SALGBC arbitrator had found that a municipal employee's dismissal was substantively fair, but procedurally unfair because the municipality had not followed any procedure when summarily dismissing her. On review the Labour Court set aside the award because the arbitrator had failed to apply the provisions of the relevant collective agreement which provided for an enquiry to precede disciplinary sanction. On appeal, the Labour Appeal Court found that the court below had approached the matter incorrectly by relying on *Ngubeni v National Youth Development Agency & another* (2014) 35 *ILJ* 1356 (LC) to justify its focus on the collective agreement as the central issue. In that case, the cause of action relied on by *Ngubeni* was a contractual right, not an unfair dismissal dispute, which was the cause of action in this matter. The LAC upheld the appeal and confirmed the arbitrator's award (*Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union & others* at 546).

In *De Jager and Lodestone Confectionary (Pty) Ltd t/a Candy Tops* (at 662) a CCMA commissioner found that, where the chairperson of the employee's disciplinary enquiry had intervened in an attempt to obtain a plea of guilty and to secure a settlement with the employee prior to the hearing, a reasonable apprehension of bias had been proved. The employee's dismissal was found to be unfair.

The employee had been incarcerated before the commencement of his disciplinary hearing. The employer served the charge-sheet on his attorney offering the employee an opportunity to make written submissions. A CCMA commissioner found that the employer's conduct constituted compliance with the procedural fairness requirements of item 4 of the Code of Good Practice: Dismissal (*Oberholzer and Central University of Technology, Free State* at 681).

Collective Bargaining — Refusal to Bargain Dispute

A union party to a bargaining council referred a refusal to bargain dispute to the CCMA in terms of ss 64(2) and 135 of the LRA 1995. The commissioner found that the parties to the bargaining council were required to follow the peremptory procedures outlined in the council's dispute-resolution agreement. He found further that the demands in the referral were materially the same as those which were subject to a current industry dispute, and that the union was therefore not permitted to refer the dispute to the CCMA (*National Union of Mineworkers on behalf of Members and SS Profiling (Pty) Ltd* at 681).

Practice and Procedure

In *Zungu v Premier of the Province of KwaZulu-Natal & others* (at 523) the Constitutional Court confirmed that the rule of practice that costs follow the result does not apply in the labour courts and that the norm is that costs orders are to be made in accordance with the requirements of the law and fairness. The court was satisfied that, in this matter, neither the Labour Court nor the Labour Appeal Court had exercised its discretion judicially when mulcting the applicant with costs, and it was therefore entitled to interfere with the costs awards. It found that, taking into account the considerations of the law and fairness, it would be in accordance with justice that each party pay its own costs.

Several contempt of court applications were considered by the Labour Court. In *Kare Sheet Metal Products (Pty) Ltd v Breytenbach* (at 603), where the employer relying on a restraint of trade agreement had obtained a default order restraining a former employee from being employed by a competitor, the court refused to grant a contempt order because the restraint order had been obtained in the absence of the employee and an application for the rescission of the order was pending before the court. The court was of the view that the rescission application automatically suspended the operation of the restraint order. In *KPMM Road & Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union & others* (at 609) the court found that both the union and employees were guilty of contempt of a court order interdicting strike action during a protected strike. In *Swissport SA (Pty) Ltd v Mphahlele & others* (at 656) the court found that it could not find that the union office-bearers were in contempt where the court order was vague and did not impose specific duties on the office-bearers.

In *Edcon Ltd v Steenkamp & others* (at 531), the Labour Appeal Court found that the appellants' explanation in support of condonation, relying on a failed legal strategy to justify the excessive delay, was not acceptable. In both *Septoo v City of Johannesburg* (at 580) and *Bakulu v Isilumko Staffing (Pty) Ltd & others* (at 597) both the Labour Appeal Court and the Labour Court granted absolution from the instance in the respective cases before them.

Quote of the Month:

Sutherland JA in *Edcon Ltd v Steenkamp & others* (2018) 39 *ILJ* 531 (LAC):

'As regards the very concept of the "interests of justice" some clarification is warranted. It has been said of the fairness jurisprudence of the Labour Courts that the prescribed measure of fairness is not a warm fuzzy feeling you experience in your tummy. The same caution needs to be expressed about the "interests of justice". In real life, losses are experienced and they have to fall somewhere. Much of our law is devoted to the development of norms, principles and rules to decide where such losses must fall; this is evidenced most starkly in the law of delict. This, sometimes, daunting exercise of weighing the interests of justice aims at even-handedness among adversaries too. Accordingly, the enquiry into the "interests of justice" always occurs within a fact-specific context. The notion that the respondents have been denied access to a court to ventilate a grievance cannot be examined within a paradigm that ignores the interests of the adversary, nor of the ordinary dynamics of litigation, more especially, because the reality is that litigation is a process in which adversaries make choices. If the consequences of choices that are made are that opportunities to pursue other options are forfeited, it does not follow that there is a failure of justice. The litigation system affords litigants a process within which they must navigate their own routes; it is no failure of justice if their journey culminates in a dead end.'