

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Contract of Employment — Interpretation of Phrase in Contract

A contract of employment provided that the employee would be entitled to a ‘severance package’ if her employment was terminated for any reason other than dishonesty. The Labour Appeal Court found that an analysis that focussed on the traditional usage of the phrase ‘severance package’ rather than the whole text in context was the incorrect approach. In this matter there was no reason why, in the context, the phrase could not refer to payment upon the resignation of the employee (*World Luxury Hotel Awards (Pty) Ltd v De Wet* at 808).

Contract of Employment — Breach — Claim for Damages

The former employee of a company had enticed a fellow employee to leave the company in breach of a contractual undertaking. The Labour Court found that the company suffered damages and that the damages it suffered were a natural and foreseeable consequence of the employee’s contravention of his contractual undertaking. The employee was therefore liable for the damages suffered by the employer (*Massmart Holdings Ltd v Theron* at 870).

Contract of Employment — Fixed-term Contract

An employee had been employed on successive fixed-term contracts. In unfair dismissal proceedings before the CCMA, the employer conceded that, but for its operational requirements, the employee’s contract would have been renewed. The commissioner found that the employee had proved a reasonable expectation of renewal of her contract, and that the termination constituted an unfair dismissal. The commissioner also found that the employee’s employment was deemed to be of indefinite duration in terms of s 198A(3) of the LRA 1995 (*Conn and College Street Primary School* at 933). Similarly, in *National Union of Metalworkers of SA on behalf of Gugwana and RCG Engineering CC t/a Secant Engineering* (at 953), the CCMA commissioner examined the employee’s fixed-term contract, and found that the contract had no termination date and made no reference to any particular project — his employment was therefore deemed in terms of s 198A(3) to be of indefinite duration.

Temporary Employment Service

In *Hluthwa & others and Gauteng Department of Health & another* (at 943) cleaners who were employed by a service provider and placed at a provincial hospital sought permanent employment with the hospital relying on s 189A(3)(b) of the LRA 1995. The CCMA commissioner found that the deeming provision only applied if the relationship was one between a temporary employment service and a client. In this matter the evidence clearly proved a genuine service provider and client relationship. The commissioner accordingly ruled that the cleaners were permanently employed by the service provider.

An employee who was recruited by a company elected to use a temporary employment service in order to structure his remuneration in a tax efficient manner. When his services were terminated, the question arose whether he was employed by the TES or the client. A CCMA commissioner found that, where parties are in relatively equal bargaining positions and consciously elect one contract or relationship over another, legal effect has to be given to that choice. The commissioner therefore found that the contract between the employee and the TES was genuine and not a sham, and that the TES was the true employer of the employee (*Wallis and MPC Recruitment CC & others* at 958).

Jurisdiction — Labour Court

In *Mphahlele v Ephraim Mogale Municipality* (at 879), where the applicant claimed for patrimonial loss arising from the termination of his employment and damages for defamation from his former employer, the Labour Court confirmed that it has no jurisdiction to adjudicate delictual claims.

Transfer of Business as Going Concern

The Labour Court has found that where there is a conflict between the provisions of s 197 and s 23 of the LRA 1995, the latter prevails. Consequently, following the transfer of employees from a municipal owned entity to the municipality itself in terms of s 197, the terms and conditions of employment in the bargaining council collective main agreement to which the municipality and the unions were party trumped the terms and conditions in the plant level collective agreement of the old employer (*SA Municipal Workers Union & another v City of Johannesburg & others* at 894).

Employee — Uber Drivers

In *Uber SA Technology Services (Pty) Ltd v National Union of Public Service & Allied Workers & others* (at 903) the Labour Court, having considered the test for determining whether a person is an employee, found that Uber drivers are not employees of Uber SA.

Compensation

In *Jorgensen v I Kat Computing (Pty) Ltd & others* (at 785) the Labour Appeal Court confirmed that compensation for the unfair dismissal of an employee on a fixed-term contract is limited to the remaining period of the contract. However, in *Mvubu and Workers' College KZN* (at 949) the CCMA commissioner expressed the view that a commissioner is not restricted to awarding compensation that might result in an employee being awarded more than he would have received had he been paid up to the date of expiry of his fixed-term contract.

In *Road Traffic Management Corporation v Commission for Conciliation, Mediation & Arbitration & others* (at 887) the Labour Court reiterated that the court is not to interfere with the exercise of a commissioner's discretion to determine just and equitable compensation for an unfair dismissal unless that discretion is not exercised judicially, or exercised capriciously, or with bias, or based on the wrong principle or approach, or not for a substantial reason.

Retrenchment

The Labour Appeal Court has confirmed that consultation is a joint consensus-seeking process undertaken by an employer and employees when the employer is contemplating retrenchments, but that it is not required of the process that a position be secured for every employee as of right (*TWK Agri (Pty) Ltd v Wagner & others* at 797).

Dismissal — Insubordination

The Labour Appeal Court found, in *Jorgensen v I Kat Computing (Pty) Ltd & others* (at 785), that an employee is not obliged to attend a disciplinary enquiry, and that in this matter the employee's failure to do so did not constitute insubordination.

Bargaining Councils

In *Appels v Education Labour Relations Council & others* (at 816) the Labour Court found that the time periods set in a bargaining council dispute resolution agreement need not repeat those set out in s 191(1) of the LRA 1995.

In *Department of Home Affairs v Public Service Co-ordinating Bargaining Council & others* (at 823) the Labour Court confirmed that the certification of an arbitration award in terms of s 143(1) of the LRA 1995 has the same effect as an award which had been made an order of court in terms of s 158(1)(c) — the award ceases to exist and cannot be reviewed.

Residual Unfair Labour Practices

Where employees claimed that they were placed on an incorrect grade following a restructuring process at the employer, the Labour Court found that the dispute fell within the definition of an unfair labour practice relating to promotion in terms of s 186(2)(a) of the LRA 1995 (*Eskom Holdings SOC Ltd v National Union of Mineworkers on behalf of Coetzee & others* at 828).

In *Letsogo v Department of Economy & Enterprise Development & others* (at 851) the Labour Court found that a selection panel which changed the advertised requirements for a position to enable a candidate who did not qualify to be shortlisted, interviewed and promoted did not have the power to do so. It had therefore acted unlawfully, unfairly, capriciously and with bias to ensure that an unqualified candidate was promoted. The promotion constituted an unfair labour practice and was set aside.

In *Johannesburg Water (SOC) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 845) the Labour Court found that, where the employer's remuneration policy provided for the payment of bonuses to qualifying employees once the employer had reached its organisational performance threshold, the employer could not unilaterally deprive deserving employees of this well-entrenched benefit. The employer's decision not to pay the employee his performance bonus was therefore arbitrary, capricious and inconsistent with the remuneration policy.

Quote of the Month:

Van Niekerk J in *Mphahlele v Ephraim Mogale Municipality* (2018) 39 ILJ 879 (LC):

'This court has a substantial backlog, both in relation to matters referred for trial and opposed motions. In both instances, parties are being expected to wait for up to 12 months for the allocation of hearing dates. Matters such as the present, which are so manifestly misguided and devoid of merit, require the same time, attention and allocation of scarce resources as those matters that disclose genuine disputes justiciable by this court. The parties in those matters are prejudiced by the referral of disputes such as the present. The court ought to mark its disapproval of those practitioners who persist with claims of the sort described above and who undermine the statutory purpose of expeditious and efficient dispute resolution. If a costs order *de bonis propriis* is an appropriate means of achieving that end, then so be it.'