

# HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

## CCMA Conciliation Proceedings — Nature of Proceedings

In *September & others v CMI Business Enterprise CC* (at 987) the employees referred an unfair discrimination dispute to the CCMA, but the parties agreed at conciliation that the dispute in fact related to a claim for automatically unfair constructive dismissal. The Labour Court had regard to the evidence of discussions at conciliation when it determined the true nature of the dispute. The Constitutional Court considered the purpose of rule 16 of the CCMA Rules, relating to the confidentiality of conciliation proceedings, both before and after its 2015 amendment, and found that evidence as to the nature of the dispute, being merely descriptive in nature, was not privileged. The court was therefore satisfied that evidence of discussions at conciliation as to the nature of the dispute was not privileged and could be led in subsequent proceedings.

## Disciplinary Code and Procedure — Double Jeopardy

The employee was initially charged with fraud at a disciplinary enquiry, but was found not guilty. It was later found that the documents on which she had relied at the enquiry had been forged, and she was charged with misconduct related to forgery and was dismissed. At arbitration the commissioner found that she had been subjected to double jeopardy and ordered her reinstatement. On review the Labour Court examined the concept of double jeopardy and found that the first acts of misconduct on which she had been exonerated were clearly distinguishable from the second notwithstanding the similarities in their facts and role players. The commissioner had therefore misdirected himself by conflating them, and his award was set aside. On appeal, the Labour Appeal Court noted that the principle of double jeopardy has, at its heart, fairness and this principle simply entails that an employee cannot, generally, be charged again with the same misconduct of which he or she was found guilty or not guilty.

The court agreed with the finding of the court below that the charges of misconduct at the first enquiry were not the same as the charges faced by the employee at the second enquiry. It accordingly upheld the court below's decision (*Mahlakoane v SA Revenue Service* at 1034).

## Appeal — Against Findings Not Order of Labour Court

In *Clencor (Pty) Ltd v Mngezana NO & others* (at 1029) the appellant appealed, not against the order but against certain findings made by the Labour Court when it set aside an arbitration award and remitted the matter to the CCMA. The Labour Appeal Court found that the judgment of the court below contained far-reaching and conclusive findings that were dispositive of substantial issues. These finding could be prejudicial when the matter was arbitrated afresh by the CCMA, and it was in the interest of justice that the findings be set aside.

## Automatically Unfair Dismissal — Dismissal for Union Activities

The employee, a shop steward, was dismissed for circulating a dossier which contained allegations of misconduct by senior employees of the employer, Telkom. The Labour Court found that the employee had merely been executing his union duties on instructions from the union general secretary when he circulated the dossier. The employee had successfully discharged the evidential burden on him by placing sufficient evidence before the court to show that the dominant or most likely reason for his dismissal was his performance of union activities. His dismissal was therefore automatically unfair in terms of s 187(1)(d) of the LRA 1995 (*Mashaba v Telkom SA* at 1067).

## CCMA Arbitration Proceedings — Credibility of Witnesses

In *Harmony Gold Mining Co Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 1059) the Labour Court reviewed and set aside a CCMA commissioner's award having found that the commissioner made credibility findings based on immaterial and minor inconsistencies in the evidence of the employer's witnesses and his own undisclosed personal observation of the witnesses. The court noted that credibility findings based on observation of a witness are not the only or the first recourse in assessing credibility and even less so in evaluating probabilities. It cautioned that adjudicators should be wary of making definitive credibility findings based on their supposed omniscient ability to detect unreliable evidence solely from observing a witness.

## CCMA Arbitration Proceedings — Legal Standing

In *Mathole & others v Governing Body of the Commission for Conciliation, Mediation & Arbitration & others* (at 1079), the Labour Court ruled that the applicant did not meet the requirements of rule 25 of the CCMA Rules and had no locus standi to appear and represent dismissed employees in CCMA proceedings. The court noted that private individuals, such as the applicant, who masqueraded as union officials in order to solicit hard earned money out of recently dismissed employees with a promise of taking up their labour disputes were fraudsters. They were common criminals, and the CCMA and courts had to act harshly against them in order to protect vulnerable members of our society.

## Public Service Employee — Review in terms of Section 158(1)(h) of LRA 1995

Several applications in terms of s 158(1)(h) of the LRA 1995 to review decisions taken by disciplinary chairpersons came before the Labour Court. In *Mohlomi v Ventersdorp/Tlokwe Municipality & another* (at 1096) the court found, inter alia, that recourse to review in terms of s 158(1)(h) should be restricted or limited where the dispute can be dealt with under the dispute-resolution processes provided for in the LRA. In *National Commissioner of SA Police Service & another v Bobie NO & another* (at 1140) the court found that a public service employer cannot review a disciplinary chairperson's decision merely because it believes that the decision is incorrect. And, in *Moses Kotane Local Municipality v Mokonyama NO & another* (at 1130), the court, having found that the evidence clearly showed that the disciplinary chairperson's findings were not justifiable and clearly wrong, reviewed and set aside that decision.

## Collective Bargaining and Organisational Rights

In *Democratic Municipal & Allied Workers Union of SA on behalf of Members and Metrobus* (at 1154) and *SA Correctional Services Workers Union and National Commissioner of Correctional Services & others* (at 1186) minority unions sought to be granted organisational rights in terms of ss 12, 13 and 15 of the LRA 1995. In both matters, the CCMA considered whether the unions met the criteria prescribed in s 21(8). In *DEMAWUSA*, the commissioner found that the union, which had 27% representativity at the workplace and met the other prescribed criteria, was entitled to organisational rights; whereas in *SACOSWU*, where the union had only 5% representativity in the workplace, the commissioner declined to grant it organisational rights. In *Municipal & Allied Trade Union of SA and Saldanha Bay Municipality & others* (at 1164) a minority union sought organisational rights in terms of s 21(8C) of the LRA. The CCMA commissioner found that the union represented a ‘substantial number’ or ‘significant interest’ in the workplace and was therefore entitled to organisational rights despite the fact that it did not meet the threshold set in the threshold agreement between the majority unions and the employer.

### Practice and Procedure

In both *GRI Wind Steel SA v Association of Mineworkers & Construction Union & others* (at 1045) and *Seopa v Imperial Cold Logistics (Pty) Ltd & others* (at 1146) the Labour Court restated the requirements to be met by an applicant for an order of contempt of court. In *GRI Wind* the court found that, as no positive obligations were imposed on the union in the interdict prohibiting violence during a protected strike, it could not be held to be in contempt of the interdict. In *Seopa* the court found that it was clear from the employer’s answering affidavit that its behaviour was neither wilful nor mala fide and that it should have been apparent to both the employee and his attorneys that there was no purpose in proceeding with the application once they received the answering affidavit. The court dismissed the contempt application and ordered the employee’s attorneys to pay the employer’s wasted costs.

### *Quote of the Month:*

Tlhotlhemaje J in *Mathole & others v Governing Body of the Commission for Conciliation, Mediation & Arbitration & others* (2018) 39 ILJ 1079 (LC):

‘[I]ndividuals who do not meet the requirements set out in rule 25 of the CCMA Rules, and then masquerade as union officials in order to solicit hard earned money out of recently dismissed employees with a promise of taking up their labour disputes either in courts or labour dispute-resolution institutions, are nothing less than fraudsters. ... These individuals are shameless predatory leeches. They feed off the misery and plight of vulnerable and unsuspecting members of the public, who find themselves in hard times and desperate after the loss of a job. They are common criminals, and the CCMA and courts should act harshly against them in order to protect vulnerable members of our society.’