

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Prescription Act 68 of 1969 and Labour Relations Act 66 of 1995

The Prescription Act 68 of 1969 and the Labour Relations Act 66 of 1995 are not incompatible and both Acts can exist in harmony. The Constitutional Court in a judgment by Kollapen AJ (Cameron J, Froneman J, Kathree-Setiloane AJ, Madlanga J, Mhlantla J and Theron J concurring) found, inter alia, that an unfair dismissal claim constitutes a ‘debt’ for the purposes of s 16(1) of the Prescription Act; that the time periods in the Prescription Act are not inconsistent with those in s 191 of the LRA; and that the referral of a dispute to the CCMA for conciliation constitutes service of a process commencing legal proceedings and interrupts the running of prescription. In a separate judgment Zondi AJ (Mogoeng CJ, Zondo DCJ and Jafta J concurring), found that the provisions of s 16(1) of the Prescription Act are inconsistent with s 191 of the LRA and concluded that the Prescription Act does not apply to litigation under s 191 of the LRA. In a separate concurring judgment, Zondo DJP (Mogoeng CJ, Jafta J and Zondi AJ concurring), found that the Prescription Act does not apply to unfair dismissal disputes under the LRA as such disputes are only subject to the periods provided for in the dispute-resolution system of the LRA, which is a self-standing system carefully crafted to strike a fair balance between the interests of workers and those of employers (*Food & Allied Workers Union on behalf of Gaoshubelwe v Pieman’s Pantry (Pty) Ltd* at 1213).

Protected Disclosures Act 26 of 2000

In *John v Afrox Oxygen Ltd* (at 1278) the Labour Appeal Court confirmed that, where an employee had made a disclosure of perceived impropriety only to her employer, s 6 of the Protected Disclosures Act 26 of 2000 was relevant. For the disclosure to qualify for protection the employee only had reasonably to believe that the conduct was unlawful, she did not have to prove the correctness of the facts upon which her belief was based.

Sexual Harassment

The Labour Court found that a senior employee's frequent sexual advances to a subordinate over a period of seven years clearly constituted unwelcome and inappropriate conduct of a sexual nature. The court was extremely critical of the CCMA commissioner's misogynistic and patriarchal approach to the matter; his failure to consider both the Codes of Good Practice on the Handling of Sexual Harassment Cases in the Workplace 1998 and 2005; his finding that the victim's silence in the face of persistent inappropriate conduct indicated that she was 'docile' or 'inviting'; and his finding that the lapse of time before the victim reported the inappropriate conduct reflected on her credibility. The court reviewed and set aside the arbitration award and upheld the dismissal of the employee (*Rustenburg Platinum Mines Ltd v United Association of SA on behalf of Pietersen & others* at 1330).

In a matter before the CCMA, where a senior employee had touched the breasts of a young subordinate, the commissioner found that his conduct clearly constituted sexual harassment. The commissioner rejected the employee's contention that the complainant's flirtatious behaviour led him to believe that his conduct was acceptable — being flirtatious was not an invitation to sexual harassment. The commissioner upheld the employee's dismissal (*Jordaan and Capitec Bank Ltd* at 1364).

In *National Union of Public Service & Allied Workers on behalf of Qatshama and Lion Roars Safaris & Lodges* (at 1383) the applicant complainant alleging that she had been sexually harassed by her manager, referred an unfair discrimination dispute to the CCMA in terms of the Employment Equity Act 55 of 1998. At arbitration, the CCMA commissioner was faced with the version of a single witness, the complainant, which was contradicted by several witnesses for the employer. He set out the correct approach to be adopted when weighing up the probabilities of the respective versions and making credibility findings to arrive at an outcome. He accepted that the employer's version was more probable and found, accordingly, that the complainant had failed to establish sexual harassment. Similarly, in *Shayi and Eskom Holdings (Pty) Ltd* (at 1395), where the applicant employee had been dismissed for sexual harassment of a female colleague, the CCMA commissioner found that the complainant's version was inconsistent to the extent that it impacted on her credibility and that the employee's version was more probable. Sexual harassment by the employee had not been proved, and his dismissal was unfair.

In all the above matters the court and commissioners confirmed the relevance and dealt with several provisions of both the Codes of Good Practice on the Handling of Sexual Harassment Cases in the Workplace 1998 and 2005.

Demarcation Award

The scope of registration of the National Bargaining Council for the Road Freight & Logistics Industry is defined in its certificate of registration as ‘the transportation of goods for hire or reward by means of motor transport’. In a demarcation award a CCMA commissioner ruled that the term ‘goods’ included money or cash, and that consequently the appellant company’s cash-in-transit division fell within the council’s scope of registration. This award was upheld on review by the Labour Court. On appeal, the Labour Appeal Court confirmed that the word ‘goods’ in the council’s certificate of registration included cash; and dismissed the appeal (*SBV Services (Pty) Ltd v National Bargaining Council for the Road Freight & Logistics Industry & others* at 1290).

Contract of Employment — Fixed-term Contract — Reasonable Expectation of Renewal

In both *Agricultural Research Council v Commission for Conciliation, Mediation & Arbitration & others* (at 1297) and *SA Post Office SOC Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 1350) the Labour Court confirmed that the test for review of a commissioner’s finding that an employee was dismissed in terms of s 186(1)(b) of the LRA 1995 is whether the decision that the employee was dismissed was correct and not whether the decision was reasonable. In both matters the applicant employer had based its review application firmly on the incorrect reasonableness test — this was fatal to both cases, which were dismissed on this ground alone. In *Smith & another v Office of the Chief Justice & others* (at 1357) the applicant employees, who had failed to secure employment contracts following an interview process for advertised positions, sought an order declaring them to be fixed-term employees, relying on the ‘protection’ of s 186(1)(b) of the LRA. The court found that s 186 does not confer any rights or protections on employees, it merely defines ‘dismissal’. The application of s 186(1)(b)(ii) means no more than that an employee whose contract has not been renewed may assert the existence of a dismissal where he or she reasonably harbours an expectation of indefinite employment. Whether or not the dismissal so established is fair is a separate enquiry. In this matter the papers did not disclose a reason for dismissal that brought the dispute within the ambit of the court’s jurisdiction, nor was there any evidence that the dispute had been referred for conciliation, and this in itself was fatal to any unfair dismissal claim.

Settlement Agreement — Validity

At conciliation proceedings relating to the granting of ss 12, 13 and 15 organisational rights to a minority union, both the employer representative and the minority union representative held the mistaken view that the existence of a threshold agreement between the employer and the majority unions precluded the conclusion of a collective agreement conferring organisational rights on the minority union, and this led to the parties entering into a settlement agreement. In later proceedings the Labour Court found that the settlement agreement was concluded on the basis of a common mistake; and had to be set aside (*Association of Mineworkers & Construction Union on behalf of Members v Commission for Conciliation, Mediation & Arbitration & others* at 1303).

Dismissal — Incapacity — Ill-health

In *General Motors SA (Pty) Ltd v National Union of Metalworkers of SA & others* (at 1316) the Labour Court confirmed that persistent absence from work because of genuine ill-health is a legitimate ground on which to terminate employment, and one that relates to the capacity and not the conduct of the employee. Substantive fairness in these circumstances requires an assessment of whether the employer could fairly be expected to continue the employment relationship given the nature of the incapacity, its cause, the prospect of recovery, improvement or recurrence, the period of absence and its effect on the employer's operations and on other employees, and the employee's work record and length of service. In this review application, the court found that the CCMA commissioner's refusal or failure to recognise a category of dismissal that permitted an employer to dismiss an employee for persistent or habitual intermittent absence on account of ill-health constituted an error of law and rendered his award reviewable.

Employment of Educators Act 76 of 1998 — Dismissal by Operation of Law

Section 14(1)(a) of the Employment of Educators Act 76 of 1998 provides for the discharge of an educator who has been 'absent from work' for a period exceeding 14 consecutive days without permission. The days envisaged in s 14(1)(a) are stated in clear and unambiguous language — they are days of absence from work, and do not include weekends (*Member of the Executive Council for the Department of Education, Eastern Cape v Bantwini NO & others* at 1327).

Quote of the Month:

Kollapen AJ in *Food & Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd* (2018) 39 ILJ 1213 (CC):

'The LRA and the Prescription Act both seek to achieve objectives that are compatible with each other — the efficient and timely resolution of disputes within a specified time frame. They are not at opposite ends of the litigation spectrum nor do they seek to advance different and inconsistent litigation imperatives. They can and do co-exist alongside each other in an integrated fashion.'