

# HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

## Dismissal — Racist Utterances

In *Rustenburg Platinum Mines v SA Equity Workers Association on behalf of Bester & others* (at 1503) the Constitutional Court confirmed the Labour Appeal Court finding that the test whether words uttered are derogatory and racist is objective. However, the court found that the LAC's approach of considering that words or phrases, in this matter the words 'swart man', are presumptively neutral failed to recognise the impact of the legacy of apartheid and racial segregation that has left a racially charged present — it cannot be correct to ignore the reality of our past of institutionally entrenched racism and begin an enquiry into whether or not a statement is racist and derogatory from a presumption that the context is neutral.

As the employee who uttered the racist words had demonstrated a lack of remorse, persisted with a defence of complete denial and made no attempt to apologise, the court found that dismissal was the appropriate sanction.

In *Dagane v Safety & Security Sectoral Bargaining Council & others* (at 1592), the Labour Court found that vitriolic racist comments posted by a police officer on a politician's Facebook page constituted hate speech. It found that, especially because the utterances were made by a police officer on a quasi-public forum, dismissal was the appropriate sanction.

## Dismissal — Constructive Dismissal

The employee objected to a change in the assessment of her performance and resigned. She referred a constructive dismissal dispute to the CCMA which found in her favour. On review, Labour Court found that management has the prerogative to decide how to assess the performance of its employees as long as the method of assessment is reasonable and rationally connected to the job of the employee. It found further that the employee had only objected to the method of assessment of performance after she received a poor rating; that the method of assessment applied to all employees; that the employee had been offered assistance, and that the employee's job had not been in jeopardy when she resigned. The court was therefore satisfied that her resignation was manifestly unreasonable. She had, therefore, not been constructively dismissed (*Bakker v Commission for Conciliation, Mediation & Arbitration & others* at 1568).

## Dismissal — Dismissal for Operational Requirements or Dismissal for Refusal to Accept Demand

In *National Union of Metalworkers of SA on behalf of Members v Aveng Trident Steel (A Division of Aveng Africa) (Pty) Ltd & another* (at 1625) the Labour Court examined the distinction between a dismissal to compel employees to accept a demand as envisaged in s 187(1)(c) of the LRA 1995 and a dismissal for operational reasons in terms of s 189. It confirmed that, where the dominant reason for dismissal is the employer's operational requirements, as in this matter, and not the employees' refusal to accept new conditions of employment, the dismissal is not automatically unfair.

## Dismissal — Conflict of Interest

In *Phaswana and Figo Putso Construction CC* (at 1676) the employee, who had registered a company in competition with his employer, was dismissed. The CCMA commissioner noted that the relationship between an employer and an employee is a fiduciary one and that an employee who secretly competes with his employer's business for his own account commits a gross breach of that fiduciary duty. The commissioner therefore found that the employee's dismissal was fair.

## Dismissal — Refusal to Obey Instruction

The employee, a security guard placed at a casino, had been dismissed after he failed to comply with an order that he prevent a gambler who was subject to a warrant of arrest from leaving the casino premises. In unfair dismissal proceedings the CCMA commissioner found that a security officer had no more power of arrest than an ordinary citizen. An instruction to him to arrest a person was therefore not lawful and his failure to obey the instruction could not constitute misconduct. The employee's dismissal was unfair and he was reinstated (*SA Transport & Allied Workers Union on behalf of Phakathi and Bidvest Protea Coin (Pty) Ltd* at 1685).

## Strike — Demand

In *Borbet SA (Pty) Ltd v National Union of Metalworkers of SA & others* (at 1585) the Labour Court found that, although the respondent trade union had complied with the procedural provisions for strike action, the strike demands were in retaliation against the employer's participation in a demarcation process and the strike was therefore unprotected. The court found further that the strike constituted discrimination against the employer for exercising its rights under the LRA 1995, and was therefore in direct contravention of s 7(1) of the LRA.

In *Vector Logistics (Pty) Ltd v National Transport Movement & others* (at 1653) the Labour Court found that, where the dispute between the parties related to the employer's failure to provide lunch breaks in terms of the Basic Conditions of Employment Act 75 of 1997, the dispute could be adjudicated by the court and the strike was therefore unprotected. It was also unprotected because the demand for payment for nine consecutive hours of work as the employees believed they were unable to take a lunch break was an unlawful demand. The rule nisi interdicting the strike was confirmed.

## Protected Disclosures Act 26 of 2000

A senior employee had disclosed unfair discrimination to the CEO of her employer following a statement by the CEO of the holding company that the employee was a female employment equity appointment who would never achieve the position of CFO of the holding company. The High Court found, having set out the test to determine whether a person has made a protected disclosure, that the employee's disclosure fell within the parameters of s 6 of the Protected Disclosures Act 26 of 2000. The occupational detriments to which the employee was subjected following her protected disclosure, namely being suspended, subjected to disciplinary action and ultimately dismissed, were in violation of s 3 of the PDA and unlawful. The court found further that the employer was liable for payment of the delictual damages proven by the employee. It also found that the CEO of the holding company and the holding company were liable, jointly and severally, for damages for the impairment of the employee's dignity (*Chowan v Associated Motor Holdings (Pty) Ltd & others* at 1523).

## Sexual Harassment

A female miner was subjected to Facebook rumours about infidelity and her male co-workers lodged a grievance against her. The employee was transferred to another mine without the employer convening a hearing or allowing the employee to challenge the allegations against her. The employee referred a dispute to the CCMA in terms of the Employment Equity Act 55 of 1998 and the commissioner found that the probabilities favoured the conclusion that the employee's transfer was related to the Facebook rumours — this conduct amounted to unfair discrimination on the grounds of gender. Moreover, the employer had failed to take steps to resolve the employee's grievance, and was therefore liable in terms of s 60.

The commissioner awarded compensation for the unfair discrimination the employee had suffered at the hands of her co-workers and management (*Du Plessis and Rickjon Mining & Engineering* at 1665).

## Collective Agreement

In *Association of Mineworkers & Construction Union v Minister of Labour & others* (at 1549) the Labour Court found that a review of the extension of a collective agreement to non-parties in terms of s 23(1)(d) of the LRA 1995 is only possible on the test of legality measured by the minimum standards of lawfulness and non-arbitrariness.

## Private Arbitration — Review

In an application to review a private arbitration award in terms of s 33 of the Arbitration Act 42 of 1965 the Labour Court found that the arbitrator had not been appointed in accordance with the arbitration agreement, that the applicant employer had not been notified of the arbitration hearing in accordance with the provisions of the Act, and that the arbitrator had not satisfied herself that the employer had received notification. The court accordingly reviewed and set aside the award (*Unicorn Pharmaceuticals (Pty) Ltd v Edwards NO & others* at 1646).

## Costs — Hopeless Cases

The Labour Court has cautioned practitioners and others with right of appearance in the Labour Court about the continued abuse of the court's process notwithstanding prior indications from the bench that given the court's limited resources and the backlogs that have built up, consideration would be given to making punitive costs orders and orders to the effect that practitioners forfeit their fees when that is appropriate. The court endorsed the view expressed recently that it is improper for counsel to act for a client in respect of a claim or defence which is hopeless in law or on the facts — there is an ethical obligation to ensure that only 'genuine and arguable' cases are ventilated and that this can be achieved without delay (*Mashishi v Mdladla NO & others* at 1607).

## Legal Representation — CCMA Arbitration Proceedings

In both *Carter and Marble Classic Exclusive Warehouse for Natural Stones (Pty) Ltd* (at 1660) and *Simelane and Interwaste Cleaning (Pty) Ltd* (at 1695) CCMA commissioners restated the requirements for legal representation at CCMA arbitration proceedings as set out in rule 25 of the CCMA Rules. In *Carter* the commissioner confirmed that a commissioner is required independently to exercise a discretion whether or not to grant legal representation even where both parties have consented thereto. In *Simelane* the commissioner refused to allow the employer's industrial relations officer, who was an employee of the employer, the right to represent the employer as she was an admitted attorney and therefore a legal practitioner as defined in s 213 of the LRA 1995.

## Practice and Procedure

An employee who accepted and retained payment of compensation in terms of an arbitration award then approached the Labour Court to review the award. The court found that the acceptance and retention of the compensation did not support an objective intention to challenge the award. It found further that the employee was opportunistic to argue that she had retained the compensation as such compensation would, in any event, be part of the outcome of reinstatement with backpay that she sought in the review. The court accordingly found that the employee had acquiesced in the award and her right to set it aside had been preempted (*Mdhluli v Commission for Conciliation, Mediation & Arbitration & others* at 1614).

*Quote of the Month:*

Theron J in *Rustenburg Platinum Mine v SA Equity Workers Association on behalf of Bester & others* (2018) 39 ILJ 1503 (CC):

‘Gratuitous references to race can be seen in everyday life, and although such references may indicate a disproportionate focus on race, it may be that not every reference to race is a product or a manifestation of racism or evidence of racist intent that should attract a legal sanction. They will, more often than not, be inappropriate and frowned upon. We need to strive towards the creation of a truly non-racial society. The late former President of the Republic of South Africa, Mr Nelson Mandela, said that “de-racialising South African society is the new moral and political challenge that our young democracy should grapple with decisively”. He went on to say that “we need to marshal our resources in a visible campaign to combat racism — in the workplace, in our schools, in residential areas and in all aspects of our public life”. This court has echoed such sentiments when it recognised that “South Africans of all races have the shared responsibility to find ways to end racial hatred and its outstandingly bad outward manifestations”.’