

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Co-operatives Act 14 of 2005 — Whether Members of Worker Cooperative Employees

In *National Bargaining Council for the Clothing Manufacturing Industry (KZN Chamber) v Glamour Fashions Worker Primary Co-operative Ltd & others* (at 1737) the Labour Appeal Court confirmed the Labour Court finding that there is no direct, a priori conflict between the provisions of the Co-operatives Act 14 of 2005 and the LRA 1995 and that members of a legitimate worker cooperative do not fall under the definition of ‘employee’ in the LRA.

CCMA Conciliation Proceedings — Nature of Proceedings

The Labour Court has noted that, following the Constitutional Court decision in *September & others v CMI Business Enterprise CC* (2018) 39 ILJ 987 (CC), the legal position relating to the conciliation of disputes is as follows: A dispute about the fairness of a dismissal must be referred to conciliation. The Labour Court’s jurisdiction cannot be extended to adjudicate disputes that have not been conciliated at all as it is indispensable and a precondition to jurisdiction over unfair dismissal disputes. The Labour Court should however not adopt a legalistic and overly formalistic approach in deciding whether it has jurisdiction and should not only consider the characterisation of the dispute in the referral form and the contents of the certificate of outcome, but should also consider whether, during the conciliation process, the real dispute was apparent and conciliated. If the real dispute was conciliated, irrespective of the contents of the referral form and the certificate of outcome, the Labour Court has jurisdiction to adjudicate the dispute. Each case has to be decided on its own merits and evidence needs to be placed before the court as to the real dispute the parties attempted to resolve during conciliation (*Tlou v University of Zululand* at 1841).

Disciplinary Code and Procedure — Right to Internal Appeal

An employee's contract of employment provided that all internal remedies had to be exhausted before she could refer a dispute to the CCMA. After the employee's dismissal she delayed in exercising her right to appeal, and the employer contended that her right to an internal appeal had lapsed. In an application for specific performance of her contract, the Labour Court found that the delay did not amount to a waiver and that the employee was entitled to specific performance (*Huma v Council for Scientific & Industrial Research & another* at 1753).

Disciplinary Code and Procedure — Right to Interpreter

In *Mmola v Commission for Conciliation, Mediation & Arbitration & others* (at 1793) the Labour Court confirmed that the right to an interpreter at a disciplinary hearing is a cardinal right that cannot easily be waived and it is manifestly unfair to expect an employee to testify in a language in which he or she is less than proficient.

Organisational Rights — Legal Standing of Unions

In *Lufil Packaging (Isithebe), A Division of Bidvest Paperplus (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 1786) the Labour Court found that there are only two conditions that a trade union must comply with in order to have locus standi to apply for the organisational rights conferred by chapter III of the LRA 1995 — the union must be registered and it must be sufficiently representative.

Enquiry by Arbitrator in terms of Section 188A of LRA 1995

The Labour Court has noted that the purpose of s 188A(11) of the LRA 1995 is to avoid disputes where an employee claims that the holding of an enquiry into allegations of misconduct breaches the provisions of the Protected Disclosures Act 26 of 2000. The section permits either party to insist on an enquiry under s 188A, and, when an employee requests such an enquiry, the employer has no discretion to refuse to consent to the request (*Nxele v National Commissioner: Department of Correctional Services & others* at 1799).

Unfair Discrimination — Disability

The employee firefighter was permanently injured while on duty. The city accommodated the employee after his injury and retained him on the level of firefighter although he performed administrative work. When the employee applied for promotion to senior firefighter, the city, relying on its policy, declined the promotion. In unfair discrimination proceedings, the Labour Court found that the city's reliance on the defence that the employee did not meet the 'inherent requirements of the job' was undermined by its own earlier decision to keep the employee in the fire and rescue service and that its application of the policy to prevent the employee from advancement due to disability amounted to unfair discrimination (*SA Municipal Workers Union on behalf of Damons v City of Cape Town* at 1812).

Public Service Employee — Unlawful Dismissal

The penalty imposed on a public service employee following a disciplinary enquiry was changed from a final written warning to dismissal. The employee applied for an order declaring his dismissal unlawful as it breached his contract of employment. The Labour Court agreed that, since the Constitutional Court decision in *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)* (2016) 37 ILJ 564 (CC), it was clear that the Labour Court should not entertain claims based on the invalidity of a dismissal. However, the Constitutional Court was concerned with declarations of invalidity of dismissals based on noncompliance with the provisions of the LRA 1995 and not with the court's exercise of its powers to determine contractual disputes under s 77(3) of the Basic Conditions of Employment Act 75 of 1997 nor was it concerned with the exercise of the court's powers to 'review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law' as provided for in s 158(1)(h). The court was satisfied that the employee's dismissal was in breach of his contractual rights and ultra vires, and ordered his reinstatement (*Tshivhandekano v Minister of Mineral Resources & others* at 1847).

Costs — Frivolous Cases

The Labour Court has found that the view, since the Constitutional Court judgment in *Zungu v Premier of the Province of KwaZulu-Natal & others* (2018) 39 ILJ 523 (CC), that the Labour Court had been stripped of its discretion to award costs against employee parties was incorrect. What the Constitutional Court did was to remind the Labour Court what was said by the Labour Appeal Court in *Member of the Executive Council for Finance, KwaZulu-Natal & another v Dorkin NO & another* (2008) 29 ILJ 1707 (LAC), namely that the norm in the Labour Court is that, in the exercise of its discretion, the court is to take into account considerations of law and fairness, and is to strike a balance between allowing employees to approach the court and discouraging frivolous cases (*Kabe v Nedbank Ltd* at 1760).

Unprotected Strike — Urgent Interdict Against Strike Action

The Labour Court has found, in *Sun International Ltd & another v SA Commercial Catering & Allied Workers Union & others* (at 1837), that a trade union was not entitled to revisit the decision that an application for an interdict against unprotected strike action was urgent on the return day — it was implicit in the fact that the court had issued the interim interdict that the judge must have decided that the matter was urgent otherwise the matter would have been struck off the roll for lack of urgency.

Residual Unfair Labour Practice — Disciplinary Action Short of Dismissal

A senior political reporter at the SABC had breached a workplace rule relating to impartiality in reporting and was demoted to general reporter and issued with a final written warning. In unfair labour practice proceedings, a CCMA commissioner found that the sanction of final written warning was fair, but that the change in his role was tantamount to a unilateral change to his terms and conditions of employment and constituted an unfair labour practice (*Broadcasting Electronic Media & Allied Workers Union on behalf of Msimang and SA Broadcasting Corporation* at 1857).

The employees were issued with a final written warning for refusing to work a shift falling partly within a public holiday. In unfair labour practice proceedings, the employees contended that the instruction to work was unlawful. The bargaining council arbitrator considered the provisions of the Public Holidays Act 36 of 1994 and the Basic Conditions of Employment Act 75 of 1997, especially s 18(1) and 18(5), and found that the instruction was not in contravention of the BCEA. The instruction had therefore been lawful and the employees had been obliged to comply with it. The arbitrator found the final written warning was fair and dismissed the claim (*Nakani & others and BASF SA Holdings (Pty) Ltd* at 1889).

Residual Unfair Labour Practice — Benefits

An employee of PRASA had taken on functions in addition to his usual duties, and after several years claimed an ad hoc salary adjustment and a responsibility allowance in terms of PRASA's remuneration policy. In unfair labour practice proceedings, a CCMA commissioner found that PRASA's conduct in refusing the employee's requests constituted an unfair labour practice within the scope of s 186(2)(a) of the LRA 1995. He found that the salary adjustment claim was premature, but that the employee was entitled to the responsibility allowance (*General Industrial Workers Union of SA on behalf of Bayi and Passenger Rail Agency of SA* at 1868).

For about 20 years the employer had allowed employees to use a sleepover facility during the work week, but, when the facility fell into disrepair, the Department of Labour prohibited anyone from occupying it until repairs were effected. The employer denied that the facility was part of the employees' terms and conditions of employment and that it was liable to repair the damages. In unfair labour practice proceedings, a CCMA commissioner found that access to the sleepover facility constituted an advantage or privilege offered to employees in terms of a practice over a number of years and constituted a benefit within the scope of s 186(2)(a) of the LRA 1995. The employer was ordered to restore the employees' benefit of accommodation within 60 days (*SA Clothing & Textile Workers Union on behalf of Dlamini & others and W D Gray & Sons t/a Peak View Sawmills* at 1880).

Residual Unfair Labour Practice — Unfair Suspension

The employees were arrested on charges of fraud and later released on bail. Their bail conditions effectively prevented them from returning to work. After the charges were withdrawn the employees returned to work. In CCMA proceedings they claimed that they had been unfairly suspended and claimed payment of their salaries for the period of their absence. The commissioner found that there was no conduct on the part of the employer that led to the employees not being at work. The decision to impose the bail conditions was not taken by the employer and the employees' absence from work was due to a supervening impossibility of performance arising from a decision of the court (*National Union of Hotel Restaurant Catering Commercial Health & Allied Workers on behalf of Mashabane & another and Kit Kat Group* at 1877).

Evidence — Witnesses — Irreconcilable Dispute of Fact

The Labour Appeal Court has, in *Department of Health KZN v Public Servants Association of SA & others* (at 1719), reiterated the correct approach to be adopted by an arbitrator to resolve an irreconcilable dispute of fact.

CCMA Arbitration Proceedings — Functions and Duties of Commissioners

In an application to review a CCMA arbitration award the Labour Court rejected the employee's submission that the commissioner ought to have extended a helping hand to him during the proceedings. The court found that a commissioner's duty is to provide guidance and assistance to lay litigants, but he or she cannot be seen to be assisting one party to advance its case at the expense of the other. The court, therefore, found that the 'helping hand' principle could not be relied on in review applications (*Witbooi v Commission for Conciliation, Mediation & Arbitration & others* at 1852).

Practice and Procedure

The Labour Appeal Court found that the parties had failed to comply with a Labour Court order referring a matter back to the CCMA for hearing before the same commissioner and had instead agreed to the appointment of another commissioner to hear the matter. The court insisted that the order had to be complied with and referred the matter back to the CCMA (*National Education Health & Allied Workers Union on behalf of Hoho v Commission for Conciliation, Mediation & Arbitration & others* at 1743). In *Ellies Electronics (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others: In re Ellies (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 1748) the Labour Court found that it is not possible to reinstate a withdrawn review application.

The Labour Court considered exceptions raised by employer's in several matters. In *Khan v MMI Holdings Ltd* (at 1772) the court confirmed that an exception is to be determined on the pleadings, assuming the facts in the pleadings to be true and without reference to any other document. In *Simmadari v Absa Bank Ltd* (at 1819) the court confirmed that the test for an exception is whether, on all possible readings of the facts, and on every interpretation that can be put on those facts, no cause of action has been made out. In *Liquid Telecommunication (Pty) Ltd v Carmichael-Brown* (at 1779) the court found that, while rule 11 of the Labour Court Rules allowed parties to use the procedure in rule 23 of the Uniform Rules where a statement of claim was excipiable, the exception is to be determined by applying rule 6 of the Labour Court Rules.

Quote of the Month:

Moshoana J in *Kabe v Nedbank Ltd* (2018) 39 ILJ 1760 (LC):

'Since the judgment of Zungu [*Zungu v Premier of the Province of KwaZuluNatal & others* (2018) 39 ILJ 523 (CC)] there seem to be a growing view that this court has been stripped of its discretion to award costs against employee parties. This view is incorrect. What the Constitutional Court did was to remind this court of what was said in *Dorkin [Member of the Executive Council for Finance, KwaZulu-Natal & another v Dorkin NO & another* (2008) 29 ILJ 1707 (LAC)]. The discretion to award costs remains intact.'