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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Temporary Employment Service

The Constitutional Court was called upon finally to determine the correct interpretation of s 198A(3)*(b)* of the LRA 1995, which provides that employees of a temporary employment service who are placed with a client are deemed, after three months, to be employees of the client. It agreed with the Labour Appeal Court that the language used by the legislature in s 198A(3)*(b)* was plain and, when interpreted in context, supported the 'sole employer' interpretation. This interpretation was in line with the purpose of the 2014 amendments to the LRA, the primary objects of the LRA and the right to fair labour practices in s 23 of the Constitution 1996 (*Assign Services (Pty) Ltd v National Union of Metalworkers of SA & others (Casual Workers Advice Office as Amicus Curiae)* at 1911).

Constitutional Law — Right to Fair Labour Practices — Breach of Promise by State

The applicants, members of the predecessors of the respondent pension fund, were promised increases of at least 70% of the annual inflation rate as an incentive to remain in employment when Transnet was established. This promise was kept for many years. When the fund reneged on the promise, the applicants instituted a class action on behalf of thousands of similarly situated employees in the High Court. The fund excepted to the claim, which exceptions were upheld by the court. On appeal, the Constitutional Court noted the requirements and purpose of an exception, and found, inter alia, that the exception procedure was not the appropriate process to decide complex factual and legal issues and that the fund could raise its complaints as substantive defences at trial. The court also found that the facts of this case provided a compelling basis not to restrict the fair labour practice protection of s 23 of the Constitution 1996 to those who had contracts of employment (*Pretorius & another v Transport Pension Fund & others* at 1937).

Transfer of Business as Going Concern

The Labour Appeal Court agreed with the Labour Court's finding that the perfection of a notarial bond and the consequent taking possession of movable property to realise an indebtedness does not per se constitute a transfer as contemplated in s 197 of the LRA 1995. The court, however, disagreed with the court a quo that in this matter there had been the transfer of a business as a going concern. It was clear that the company had been acting as a creditor seeking to realise the indebtedness and had not assumed responsibility for the employment contracts of the employees (*Spar Group Ltd v Sea Spirit Trading 162 CC t/a Paledi & others* at 1990).

Strike — Unprotected Strike — Ultimatum

The Labour Appeal Court, in *County Fair Foods (Epping), A Division of Astral Operations Ltd v Food & Allied Workers Union & others* (at 1953), found that it was appropriate to distinguish between striking employees who complied with an ultimatum to return to work and those who did not when determining sanction. It upheld the sanction of dismissal imposed on the employees who had not initially complied with the ultimatum.

Reinstatement — Meaning

The Supreme Court of Appeal had ordered the employer, the SAPS, to reinstate the employee in the position he occupied at the time of his dismissal. In contempt proceedings the Labour Court found that this meant reinstatement in the post as restructured and upgraded after the employee's dismissal because the SAPS could not show that the employee would not have achieved that position which was 'plausibly within his grasp' had he not been dismissed. On appeal, the Labour Appeal Court found that the aim of reinstatement in terms of s 193(1) of the LRA 1995 was to place the employee in the position he would have been but for the unfair dismissal. Where the employee in fact and law had no contractual or statutory right to promotion to a higher position and salary at the time of dismissal, reinstatement in such higher position was not permissible (*National Commissioner of the SA Police Service & another v Myers* at 1965).

Discipline — Cultural Norms and Traditions

In *Harmony Goldmine Co Ltd v Raffee NO & others* (at 2017) the Labour Court found that, although an employer is not bound by cultural norms and traditions, it should not ignore them especially when the traditions are aimed at achieving societal good and are not in conflict with the Constitution 1996.

Unfair Discrimination — Disability — Depression

The employee was dismissed for misconduct despite his defence that he had been suffering from depression for several years and that his employer had been aware of his mental health condition. The Labour Court found that the employee's condition fell within the definition of 'people with disabilities' in s 1 of the Employment Equity Act 55 of 1998. It found further that the conduct of the employer in ignoring the employee's condition and deciding to dismiss him in the circumstances, when viewed objectively against the employee's depression, had the potential to impair the employee's fundamental human dignity and, accordingly, fell within the prohibited grounds of discrimination envisaged by s 187(1)*(f)* of the LRA 1995 (*Jansen v Legal Aid SA* at 2024).

Unfair Labour Practices

Where an offer of employment had been withdrawn after the applicant failed a background check and before an employment contract had been concluded, a CCMA commissioner found that the applicant was not an 'employee' in terms of the definition of unfair labour practice in s 186(2)*(a)* of the LRA 1995 (*Funzani and Tshwane University of Technology* at 2054).

An African male was appointed to a post which was advertised for disabled persons and African females only. In unfair labour practice proceedings by two African males who were not shortlisted, the CCMA commissioner found that the employer had failed to justify the African male's inclusion on the shortlist or provide a rationale for his appointment. The applicants were deprived of a fair opportunity to compete for the post, and this constituted an unfair labour practice (*Public Servants Association on behalf of Mvala & another and SA Social Security Agency* at 2058).

In *Police & Prisons Civil Rights Union on behalf of Fukweni and SA Police Service* (at 2069) the applicant police officer had not been shortlisted for promotion because he failed to disclose prior criminal convictions. In unfair labour practice proceedings, the SSSBC arbitrator found that disclosure had been mandatory and that the employer's conduct had not been unfair.

Labour Court — Jurisdiction

The Labour Court found that the employee could not, after unsuccessfully pursuing a case in the CCMA based on the existence of an alleged unfair dismissal, abandon that cause of action and approach the Labour Court on the basis that the termination of his employment contract did not constitute a dismissal in law (*Archer v Public School — Pinelands & others* at 1998).

In *National Union of Metalworkers of SA & others v Micromega (Pty) Ltd* (at 2048) the Labour Court considered the interpretation by the courts of the phrase 'a matter concerning a contract of employment' in s 77(3) of the Basic Conditions of Employment Act 75 of 1997, and noted that in all instances the issue in dispute had in some way to be linked causally, whether directly or indirectly, to an employment contract, and that the claims sought to be enforced had to be between an employer and employee. In this matter the claim was against a third party who was never the employer of the plaintiffs, and their claim was therefore not 'a matter concerning a contract of employment'.

Bargaining Council — Functions and Duties of Arbitrators

A quality controller pointed out substantive errors in and rewrote portions of a bargaining council arbitrator's award, which the arbitrator accepted. On review of the award, the Labour Court found that the arbitrator had abrogated her responsibility to decide on the award and that this constituted a gross irregularity (*Department of Justice & Constitutional Development & others v General Public Service Sectoral Bargaining Council & others* at 2001).

Bargaining Council — Interlocutory Ruling in Arbitration Proceedings

In *Minister of the Department of Correctional Services v Mpiko NO & others* (at 2038) the Labour Court found that s 158(1B) of the LRA 1995 did not prohibit the court from reviewing an interlocutory ruling of the CCMA or a bargaining council before finalisation of arbitration proceedings if it was in the interests of justice to do so.

In *Cape Town All Stars Football Club and Lebahi & others* (at 2076) the NSL Dispute Resolution Chamber found that a contract between the club and the player that was conditional upon the player passing a medical examination contravened the NSL Rules and was accordingly illegal. The club's claim for damages arising from the player's repudiation of the contract was therefore dismissed.

The player was dismissed for bringing his club into disrepute after media reports appeared which claimed that the club used 'muthi'. The NSL DRC found that, although the player had complained to his union about the use of muthi, there was no evidence that he had approached the media. Furthermore, there was no evidence that the club's reputation was damaged by the articles. The player's dismissal was unfair and he was awarded compensation (*Mathosi and Mbombela United Football Club* at 2082).

Quote of the Month:

Froneman J in *Pretorius & another v Transport Pension Fund & others* (2018) 39 *ILJ* 1937 (CC):

'Contemporary labour trends highlight the need to take a broad view of fair labour practice rights in s 23(1). Fewer and fewer people are in formal employment; fewer of those in formal employment have union backing and protection. More and more people find themselves in the "twilight zone" of employment as supposed "independent contractors" in time-based employment subject to faceless multinational companies who may operate from a web presence. In short, the LRA tabulated the fair labour practice rights of only those enjoying the benefit of *formal employment* — but not otherwise. Though the facts of this case do not involve these considerations, they provide a compelling basis not to restrict the protection of s 23 to only those who have contracts of employment.'