

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Collective Agreements — Extension to Non-parties

The Labour Appeal Court has upheld the decision of the Labour Court that, where the employer had consulted with the majority unions as required by s 189(1)(a)-(c) of the LRA 1995 and entered into a retrenchment agreement with those unions, that collective agreement could be extended to nonparties in terms of s 23(1)(d) and confirmed that neither s 23(1)(d) nor s 189(1)(a)-(c) infringed or violated the constitutional rights of members of non-party unions (*Association of Mineworkers & Construction Union & others v Royal Bafokeng Platinum Ltd & others* at 2205).

When a peace clause was added to a collective agreement which was binding on members of a minority union in terms of s 23(1)(d) after the minority union had already referred a dispute to the CCMA, the Labour Court found that it was irrelevant that the peace clause was entered into after the procedural requirements for strike action had been complied with and that it was binding on the members of the minority union (*Glencore Operations SA (Pty) Ltd & others v National Union of Metalworkers of SA* at 2305).

Collective Bargaining — Duty to Bargain

In *Association of Mineworkers & Construction Union v Anglo American Platinum Ltd & others* (at 2280) the Labour Court confirmed that the absence of a statutory duty to bargain, much less a duty to bargain in good faith, was a conscious policy choice by the legislature.

Dismissal — Derivative Misconduct

In *National Union of Metalworkers of SA on behalf of Khanyile & others v Dunlop Mixing & Technical Services (Pty) Ltd & others* (at 2226) the Labour Appeal Court analysed the development of the concept of derivative misconduct. The majority court upheld the Labour Court judgment that found that, where it could be inferred from the evidence that certain employees were present while acts of misconduct were being perpetrated during a protected strike, those employees were bound by a duty of good faith towards the employer and breached that duty by failing to disclose the identity of the perpetrators of violence during the strike.

Dismissal — Racial Context

In several matters the CCMA considered the dismissal of employees for uttering racial slurs. In *Commission Staff Association on behalf of Roeber-Madubanya and Commission for Conciliation, Mediation & Arbitration* (at 2357) the commissioner upheld the dismissal of a black employee who asked a white colleague whether she was ‘too white’ to do a certain task. The statement by the employee was indirectly and implicitly racist as it intended to demean her colleague on the ground of race. In *Dyonashe and Siyaya Skills Institute (Pty) Ltd* (at 2369) the commissioner upheld the dismissal of an employee who had posted on Facebook the comment ‘Kill the boer, we need to kill these’. He found the statement to be racist and derogatory, that the offence was serious and that the employee had shown no remorse for his utterance. However, in *Kendrick and Nelson Mandela Metropolitan Municipality* (at 2383) the commissioner found that the dismissal of the employee who had accidentally forwarded an email in which disparaging remarks were made about the Muslim community was not fair — she had unequivocally apologised to the Muslim community, which had accepted her apology; and there was no evidence that the trust relationship had been destroyed by the incident.

Retrenchment — Consultation

In *Association of Mineworkers & Construction Union & others v Tanker Services (Pty) Ltd* (at 2265) the Labour Court confirmed that in a retrenchment process all parties must jointly seek to avoid retrenchment and seek to ameliorate its consequences — a union is not entitled to adopt an entirely passive approach to the consultation process and then later seek to hold the employer to account for a failure to comply with what amounts to a checklist.

In *SA Commercial Catering & Allied Workers Union on behalf of Mvuyana & others v Oyster Box Hotel (Pty) Ltd* (at 2337) the Labour Court found that the hotel had failed to consider the layoff of employees as an alternative to retrenchment when it closed for a two-year upgrading. As the retrenchments had occurred over 11 years earlier, the court found that reinstatement would be inappropriate and awarded the employees compensation.

Employment Equity Act 55 of 1998 — Liability of Employer

The Labour Court has confirmed that an employer can only be held liable in terms of s 60 of the Employment Equity Act 55 of 1998 for the discriminatory actions of its employees. It therefore reviewed and set aside a CCMA award in terms of which a commissioner had found the employer’s conduct in not taking action against a customer who had racially abused one of its employees amounted to indirect discrimination on the ground of race (*Shoprite Checkers (Pty) Ltd v Samka & others* at 2347).

Strike — Interdict against Strike Action

Where the union failed to raise an issue in the forum provided for in a binding collective agreement before invoking the dispute mechanisms in the LRA 1995, the Labour Court found that the strike was unprotected and interdicted it (*RCL Foods Consumer (Pty) Ltd v National Union of Food Beverage Wine Spirits & Allied Workers & others* at 2318).

Defence Force Employees — Recovery of Overpayments

The Labour Court, applying the recent Constitutional Court judgment that found that s 38(2)(b)(i) of the Public Service Act (Proc 103 of 1994), which provides for the recovery of erroneous overpayments of remuneration of public service employees, to be unconstitutional, interdicted the deduction of alleged incorrect payments from the remuneration of a member of the SANDF (*Bux v Minister of Defence & Military Veterans & others* at 2298).

Practice and Procedure

In an application to hold senior provincial officials in contempt of a court order, the Labour Court was of the view that there was no basis for a general argument of ‘executive exceptionalism’ for holders of public executive office as this might undermine the principle of equality before the law (*Premier, North West Provincial Government & another: In re Bogacwe & others v Premier, North West Provincial Government & others* at 2312). In *Robor Tube (Pty) Ltd v Metal & Engineering Industries Bargaining Council & others* (at 2332) the Labour Court declined to follow a recent judgment in which it was held that a withdrawn review application could not be reinstated.

Quote of the Month:

Coppin JA in *National Union of Metalworkers of SA on behalf of Khanyile & others v Dunlop Mixing & Technical Services (Pty) Ltd & others* (2018) 39 ILJ 2226 (LAC):

‘While one appreciates that the employer must at least be able to invite an employee to disclose his or her actual knowledge (if any) of misconduct, and warn the employee of the consequences of refusing to do so, the absence of rules regulating more extensive questioning by the employer leaves ample room for abuse. The very notion that an employee can be sanctioned for not speaking, irrespective of whether he or she has actual