

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Contract of Employment — Breach of Fiduciary Duties — Disgorgement of Secret Profits

The High Court, in *Sime Darby Hudson & Knight (Pty) Ltd v Lerena* (at 2413), considered an employee's duty to act in good faith towards his employer and the general principles relating to the disgorgement of secret profits made by the employee. It confirmed that in order to succeed in its claim for a disgorgement of profits the employer has to establish that the employee owed it a fiduciary obligation; that in breach of that obligation the employee placed himself in a position where his duty and his personal interest were in conflict; and finally that the employee made a secret profit out of corporate opportunities belonging to the employer.

Contract of Employment — Fixed-term Contract

In *Joni v Kei Fresh Produce Market* (at 2405) the High Court confirmed that it is trite law that a fixed-term contract cannot, at common law, be terminated in the absence of a repudiation or a material breach by the other party, but that it can be terminated on notice if the contract contains a specific provision permitting termination on notice during the contractual period.

Dismissal — Insubordination

The Labour Appeal Court has reiterated that insubordination involves a persistent, wilful and serious challenge to, or defiance of the employer's authority — a 'calculated challenge' to the employer's authority, which is deliberate or intentional. An employee's wilful flouting of, or refusal to accept the reasonable and lawful instruction of the employer constitutes misconduct because it poses a deliberate and serious challenge to the employer's authority, with the sanction of dismissal reserved for instances of gross insubordination (*Malamlala v SA Local Government Bargaining Council & others* at 2454).

Dismissal — Dishonesty

In *Malapalane v Glencore Operations SA (Pty) Ltd (Goedgevonden Colliery) & others* (at 2467) the Labour Appeal Court found that, where a senior laboratory employee misrepresented the results of coal test which resulted in the employer mining company suffering enormous financial loss and reputational damage, it was not necessary to determine whether the employee had the intention to deceive, all that had to be shown was that the employee misrepresented to the company that the test results were correct and accurate. The court upheld the employee's dismissal.

Where an employee responsible for checking the veracity of information in the payroll spreadsheet had altered the formula in the spreadsheet to benefit himself, the Labour Appeal Court found that the employee's conduct was dismissible and upheld his dismissal (*Nkomati Joint Venture v Commission for Conciliation, Mediation & Arbitration & others* at 2484).

An employee was dismissed for misappropriating company funds by using the company credit card for purchases in contravention of the company's policy. A CCMA commissioner found the dismissal to be unfair. On review the Labour Court rejected the employee's argument that he had not been disciplined for earlier similar transgressions and that the company had therefore acted inconsistently. It found that the overwhelming probabilities were that the employee took chances when he contravened the policy on earlier occasions, not that he bona fide believed that the policy was no longer applicable and that the company's later conduct was an inconsistent application of its policy. The court upheld his dismissal (*JDG Trading (Pty) Ltd t/a Supply Chain Services v Myhill NO & others* at 2550).

Three directors were dismissed after they made handwritten alterations to their employment contracts granting themselves increases in remuneration, backpay, performance bonuses and thirteenth cheques without board approval. A CCMA commissioner found that the directors had merely been negligent and not dishonest, and awarded them compensation for their unfair dismissal. On review, the Labour Court found that, only on a most credulous evaluation of the evidence, could the commissioner have concluded that the employees' conduct was bona fide and not unlawful and dishonest. The directors were clearly guilty of dishonesty justifying their dismissal (*Kidrogen (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* at 2560).

An employee was found guilty of deliberately falsifying payroll information resulting in the overpayment of a shop steward. A bargaining council arbitrator found that the employee had merely been incompetent and that the employer should have treated the matter as one of poor performance and not misconduct. On review, the Labour Court found that the arbitrator had misdirected himself — in deciding the fairness of the dismissal the arbitrator had to assess the fairness in relation to the reason given by the employer. Moreover, the arbitrator had found that the mere fact that the employer had offered the employee demotion as an alternative to dismissal indicated that dismissal was not warranted. The court found that the arbitrator's logic was fundamentally flawed in seeing the offer of demotion as necessarily meaning that the employee's dismissal from his post as contract supervisor was not justified. Taken to its logical conclusion, the arbitrator's approach would mean that no employer who offered an employee demotion as an alternative to dismissal would be allowed to defend the subsequent dismissal if the employee refused that alternative (*Unitrans Supply Chain Solutions (Pty) Ltd v National Bargaining Council for the Road Freight & Logistics Industry & others* at 2573).

Dismissal — Breach of Fiduciary Duties

A senior employee of the Industrial Development Corporation, responsible for ensuring that due diligence was undertaken before films received financing from the IDC, failed to disclose a negative review of a film script and misrepresented that an international company had undertaken to purchase copies of the film. She was dismissed, but reinstated by a CCMA commissioner. The Labour Appeal Court found that a high fiduciary standard was required of an employee in the employee's position. Her misrepresentation and failure to act in the best interest of the IDC had damaged the trust relationship, and her dismissal was fair (*Roscher v Industrial Development Corporation & others* at 2489).

Dismissal — Breach of Safety Rules

When two employees responsible for ensuring safety at the mine at which they worked failed to perform their functions and this resulted in the death of a miner, the Labour Appeal Court confirmed that their dismissal was fair (*National Union of Mineworkers & others v Sibanye Gold Ltd (Kloof Division) & others* at 2476).

Dismissal — Desertion

The Labour Court has aligned itself with earlier dicta that found that where an employer is, in terms of its own disciplinary code/policy, permitted to deem an employee to have deserted after a certain period of unexplained absence, there is no requirement for the employer to establish an intention to desert on the part of the employee. Upon the employee's return and the holding of an appeal process granted in terms of the policy, the onus is on the employee to provide satisfactory justification for his absence. The court criticised the CCMA commissioner's reliance in this matter on the employee's submission of copies of medical certificates at the appeal hearing on his return after his prolonged absence, finding that this approach countenanced the view that it was acceptable for an employee simply to stay away from work for a prolonged period without informing his employer of his whereabouts as long as he produced a medical certificate on his return. This approach was clearly inimical to the operational requirements of an employer. The court upheld the dismissal of the employee (*Glencore (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* at 2536).

Dismissal — Constructive Dismissal

The requirements for constructive dismissal to be established have received consideration in two recent judgments of the Labour Court and three recent awards of the CCMA. In *Agricultural Research Council v Ramashwana NO & others* (at 2509) the Labour Court found that the employee had failed to show that the employer's conduct was objectively unbearable where the employee had continued to work for 15 months after the alleged oppressive conduct by the employer. The court found that the employee had to resign within a reasonable time of the trigger event. In *Billion Group (Pty) Ltd v Ntshangase & others* (at 2516) the Labour Court found that the employee had failed to establish that continued employment had become intolerable — his mere sense of foreboding about his continued employment prospects was not sufficient to justify his resignation.

In *Democratic Nursing Organisation of SA on behalf of Mokatile and Netcare Pelonomi Private Hospital (Pty) Ltd* (at 2579) a CCMA commissioner found that the mere fact that a professional nurse had tolerated poor working conditions in the neo-natal intensive care unit at the hospital for a long time did not constitute the waiver of her right to tolerable working conditions or fair labour practices.

In *Mbambo and Barloworld Logistics (Pty) Ltd* (at 2590) a CCMA commissioner found that the incidents cited by the employee as constituting proof of harassment and victimisation on the basis of race had not established that his working conditions were intolerable. His resignation, which he later attempted to withdraw, did not constitute constructive dismissal.

The employee claimed that her employer's failure to pay commission constituted a material breach of her employment contract and resigned. She referred a constructive dismissal claim to the CCMA, where the commissioner found that the payment of commission was discretionary and not in breach of her contract. There was no culpability on the part of the employer in declining to pay commission and, in the circumstances, constructive dismissal had not been proved (*Van Niekerk and Andrew John Weyers Inc* (at 2603)).

Resignation

In *Coetzee v Zeitz Mocoa Foundation Trust & others* (at 2529) the Labour Court confirmed that an employee who resigns with immediate effect and leaves employment without giving the required notice, breaches his contract of employment and the employer is entitled to claim specific performance or damages. In this matter the court found that the employee was bound contractually to give four weeks' notice of his resignation and that during the notice period the employer was entitled to exercise its contractual rights, including its right to prosecute disciplinary proceedings and, if warranted, to dismiss the employee for misconduct.

In *Mbambo and Barloworld Logistics (Pty) Ltd* (at 2590) a CCMA commissioner confirmed that resignation takes effect immediately it is communicated if it is given in compliance with the notice or other requirements governing the contract. It needs no acceptance to be valid and so operates unilaterally. It is only if the termination is in breach of the contract that acceptance is necessary since repudiation terminates the contract if the innocent party elects not to act on it.

Labour Court — Powers

In two matters the Labour Appeal Court set out the requirements to be considered by the Labour Court when it exercises its power, on review, whether to remit a matter to the CCMA or to determine the dispute itself. In both instances the court found that the Labour Court had sufficient material before it, that the issues were clearly defined, and that the court could therefore accurately determine the matter itself (*Malapalane v Glencore Operations SA (Pty) Ltd (Goedgevonden Colliery) & others* at 2467 and *National Union of Mineworkers & others v Sibanye Gold Ltd (Kloof Division) & others* at 2476).

Quote of the Month:

Not awarded.