

# HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

## Organisational Rights — Minority Unions

The Constitutional Court was called upon to determine on appeal the correct interpretation of ss 18 and 20 of the LRA 1995. The majority court found that the existence of a threshold agreement in terms of s 18 between the employer and the majority union did not preclude the conclusion of a collective agreement in terms of s 20 between the employer and a minority union conferring organisational rights on that union. It held that this would effectively deny the minority union of the constitutional right to engage in collective bargaining and would conflict with the provisions of the LRA, the Constitution 1996 and international law (*Police & Prisons Civil Rights Union v SA Correctional Services Workers Union & others* at 2646).

## Dismissal — Racism at Workplace

A bargaining council arbitrator had found that the singing of a struggle song containing the phrase ‘hit the boer’ during a peaceful unprotected strike was inappropriate but did not constitute crude racism and did not justify dismissal of the striking employees. The Labour Court upheld the arbitrator’s finding and the Labour Appeal Court refused the company leave to appeal. In an application for leave to appeal to the Constitutional Court, the court noted that the word ‘boer’ is not a racist term. It found that there was no principle of law that racism automatically leads to dismissal, rather that arbitrators and courts should deal with racism firmly while treating perpetrators fairly — a rigid rule that every perpetrator of racism should be dismissed would be inconsistent with the principle of fairness. The court found that the award met the requirements of reasonableness and dismissed the appeal (*Duncanmec (Pty) Ltd v Gaylard NO & others* at 2633).

## Dismissal — Violence arising from Inter-union Rivalry

Members of a minority union refused to return to work because of violence arising from inter-union rivalry and were dismissed for unauthorised absence. In unfair dismissal proceedings, the Labour Court rejected their reliance on s 23 of the Mine Health and Safety Act 29 of 1966, as the employees had not relied on this section when they refused to return to work. The court found, however, that the employees' dismissal had been substantively unfair because the employees' fear that the employer could not protect them from further attacks by members of the majority union was reasonable. The employer should have treated the employees with compassion and understanding and not resorted to dismissal. The court found further that the employer had acted inconsistently by only disciplining members of the minority union and not those of the majority union. It found that reinstatement was not appropriate in the circumstances as the employees demanded that the employer and the majority union guarantee their safety as a condition for their return, which guarantee neither the employer nor the majority union had any legal obligation to provide (*Association of Mineworkers & Construction Union & others v Northam Platinum Ltd* at 2692).

## Dismissal — Bringing Employer into Disrepute

In *Little and Circle of Life HIV/AIDS Support Group* (at 2794) a CCMA commissioner found that the dismissed employee had not brought her employer into disrepute with the Department of Health where she was under a duty to report board irregularities to the department. However, in *Motsoeneng and SA Broadcasting Corporation SOC Ltd* (at 2809) the commissioner found that the employee had caused the employer great reputational harm and embarrassment when he made disparaging remarks about the employer, the board and a judge of the Labour Court during a press conference.

## Arbitration Award — Interest on Award

In *Malatji v Minister of Home Affairs & another* (at 2684) the Labour Appeal Court confirmed that, when determining a judgment debtor's liability to pay interest on an arbitration award in terms of s 143(2) of the LRA 1995, the common-law position has not been departed from — mora interest only accrues once the amount of compensation is ascertained or easily ascertainable. There is no legal principle in terms of which a debtor might be mulcted with the payment of interest for a period in circumstances where the extent of its liability has not yet been established in that period. The judgment creditor will only be entitled to the payment of interest a tempore morae on the unliquidated claim from the date of the award if the award was not challenged through the review process, or from date of the judgment on review pursuant to the court's determination of the quantum of the claim.

Employment Equity Act 55 of 1998 — Retrospectivity of Amendment to s 6(4) and s 10(6)(b)

Where an unfair discrimination dispute arose before the amendment of s 6(4) and s 10(6)(b) of the Employment Equity Act 55 of 1998 but was referred to the CCMA after the amendment became operative on 1 August 2014, the Labour Court confirmed that the dispute had to be determined in accordance with the amended provision (*Eskom Holdings SOC Ltd v De Wet NO & others* at 2715).

## Restraint of Trade Agreements

In *New Justfun Group (Pty) Ltd v Turner & others* (at 2721), *Twincare International (Pty) Ltd v Nel* (at 2760) and *Vumatel (Pty) Ltd v Majra & others* (at 2771) the Labour Court restated the well-established legal principles applicable to restraint of trade agreements.

In *New Justfun* the court was satisfied that the employer had established a protectable interest and that it was justified in rejecting the employee's undertaking that she would not entice customers to leave the employer or divulge confidential information to its competitor — the very purpose of the restraint agreement was to relieve the employer from having to rely on the employee's bona fides and to relieve it from the obligation to police such an undertaking. However, in *Twincare* the court relied on the undertaking given by the employee to find that the restraint agreement unreasonable. In *Vumatel* the court found that, although the employer had confidential information worthy of protection, the employee had resigned from the competitor before the matter was heard, and that, in the absence of an existing relationship between the employee and the competitor, there was no live dispute between the parties. The court also reiterated that, although breaches of restraints of trade had an inherent quality of urgency, urgent restraint of trade applications were no different to other urgent applications where final relief was sought — they had to satisfy all the ordinary requirements for establishing urgency set out in rule 8 of the Labour Court Rules.

## Strike — Undue Delay between Issue of Certificate and Strike Action

In *Passenger Rail Agency of SA t/a Metrorail v SA Transport & Allied Workers Union & others* (at 2733) the union had not commenced strike action after the issue of the certificate of outcome by the CCMA but had, over a period of 18 months, engaged in further negotiations and dispute-resolution steps with the employer. On the return day of a rule nisi declaring the strike to be unprotected, the Labour Court was of the view that the enquiry should not centre on a waiver of the right to strike, but rather on the loss of the union's right to rely on a particular certificate of outcome after it elected not to strike on the basis of that certificate within a reasonable period of time. The right to strike was retained, but after an unreasonable delay in acting after the issuing of the certificate, the union was required to go through the procedural steps set out in s 64 of the LRA again.

## Appeal — Application to Enforce Judgment Pending Appeal

In both *SA Municipal Workers Union v Qina & others* (at 2740) and *Shoprite Checkers (Pty) Ltd v Jansen & another* (at 2751) the Labour Court granted the applicants' applications to enforce judgments pending appeals. The courts found that s 18 of the Superior Courts Act 10 of 2013 applied to proceedings before the Labour Court and that, in both matters, the applicants had satisfied the test to determine whether to enforce a decision pending appeal.

### *Quote of the Month:*

Per Tlhotlhamajane J in *SA Municipal Workers Union v Qina & others* (2018) 39 ILJ 2740 (LC), commenting on the continuing legal battles between factions within the SA Municipal Workers Union:

‘This is indeed a sad state of affairs for a large union with a rich history in local government circles, and an important partner in the main collective agreement entered into with all local municipalities. In the end, the old African proverb that, ‘when elephants fight, it is the grass that suffers’ is even more apposite in this case. The ‘elephants’ in this case are SAMWU national office-bearers in the one corner, and the Eastern Cape PEC/ region of SAMWU in the other corner. The ‘grass’ is unfortunately the long-suffering membership of SAMWU, who diligently pay their monthly subscriptions, with an expectation that their interests as workers will be dutifully served, instead of being casualties in an internal fight which they never bargained for. In a nutshell, the internal squabbles within SAMWU are not in anyone’s interests, more specifically its members.’