

# HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

## Retrenchments

In *SA Commercial Catering & Allied Workers Union & others v Woolworths (Pty) Ltd* (at 87) the Constitutional Court confirmed that, if the elements listed in s 189A(19)(a)-(d) of the LRA 1995 are not satisfied, the dismissal of employees for operational requirements will be substantively unfair. In this matter the employer had failed to prove that the retrenchments were operationally justifiable on rational grounds as required by para (b) and had failed properly to consider alternatives to retrenchment as required by para (c), and this rendered the retrenchments substantively unfair. In an application in terms of s 189A(13) of the LRA 1995, the Labour Appeal Court found that the service provider employer had terminated indefinite duration contracts in terms of s 198B(5) on notice without following fair dismissal procedures in terms of s 189A. It ordered the employer to reinstate the employees pending compliance with a proper consultation process (*Piet Wes Civils CC & another v Association of Mineworkers & Construction Union & others* at 130).

The Labour Appeal Court, in *SA Commercial Catering & Allied Workers Union & others v JDG Trading (Pty) Ltd* (at 140), found that a resolution adopted by the executive committee that the company ‘must further reduce store staff numbers’ before it issued s 189(3) notices did not amount to a final decision to retrench. It found that, when interpreting the resolution, the context and subsequent conduct of the parties were relevant and that it was unrealistic, technical and formalistic for the union to seize on the peremptory word ‘must’ in the resolution and to divorce it from its context.

## Reinstatement — Not Reasonably Practical — Meaning

The Constitutional Court has approved earlier Labour Appeal Court authority on the meaning of ‘not reasonably practicable’ in s 193(2)(c) of the LRA 1995, finding that it means more than mere inconvenience and requires evidence of a compelling operational burden (*SA Commercial Catering & Allied Workers Union & others v Woolworths (Pty) Ltd* at 87).

The Labour Court also relied on the LAC’s interpretation of the phrase ‘not reasonably practicable’ in s 193(2)(c) of the LRA. In this matter, the employer had unfairly dismissed the employee a few years before her retirement age, and the CCMA commissioner had declined to reinstate her. On review the court found that, as the employee’s retirement age was reached after the award was handed down but before the review was determined, the remedy of reinstatement was still competent but effective from the date of dismissal to the date of retirement of the employee had she not been dismissed (*Samuel v Old Mutual Bank & others* at 205).

## Transfer of Business as Going Concern

In *Imvula Quality Protection (Pty) Ltd & others v University of South Africa* (at 104) the Labour Appeal Court confirmed that the substance and not the form of the transaction is relevant to determine whether there has been a transfer of a business as a going concern for purposes of s 197 of the LRA 1995. It upheld the Labour Court’s finding that, in this matter where the employer had terminated a security service contract, had ‘taken in’ the employees of the security company as its own employees, and had then entered into a shared services agreement with a new company to manage the security functions, the provisions of s 197 had not been triggered.

## Prescription

The Labour Appeal Court found, relying on recent Constitutional Court judgments, that an unfair labour practice claim constitutes a debt for purposes of s 16(1) of the Prescription Act 68 of 1969 which prescribes after three years (*Motsoaledi & others v Mabuza* at 117).

The Labour Court confirmed that an arbitration award requiring an employer to reinstate an employee amounts to a debt under the Prescription Act. In this matter, the employees had lodged a contempt of court application which was dismissed due to failure to effect personal service on the employer. The employees then lodged a second contempt application. The court found that, assuming that the lodging of the first contempt application had interrupted the running of prescription, prescription had resumed running from the date of its dismissal and that the award had prescribed by the time the second contempt application was lodged. Consequently, the employer’s plea of prescription succeeded (*Professional Transport & Allied Workers Union of SA on behalf of Xoloani & others v Mhoko’s Waste & Security Services* at 185).

## Contract of Employment — Automatic Termination Clause

A service provider employer placed employees with a client in terms of contracts of employment which provided that the duration of the employees' employment was dependent on the duration of the employer's contract with the client. The Labour Appeal Court found that the requirement, in s 198B(6) of the LRA 1995, that the contracts had to be in writing to be valid and lawful fixed-term contracts, had not been complied with and the requirement, in s 198B(1), that the termination had to be linked to the occurrence of a 'specific event' had not been met. The contracts of employment were therefore deemed to be of indefinite duration (*Piet Wes Civils CC & another v Association of Mineworkers & Construction Union & others* at 130).

## Jurisdiction — Labour Court Jurisdiction

The Labour Court found that the High Court has exclusive jurisdiction in terms of s 133(2)(b) of the Companies Act 71 of 2008 to lift the moratorium on legal proceedings against a company in business rescue (*Marais & others v Shiva Uranium (Pty) Ltd (In Business Rescue) & others* at 177).

The Labour Court found that s 158(1)(b) of the LRA 1995 does not confer jurisdiction on the Labour Court to enforce the provisions of the LRA or any other employment law. It found further that it has no jurisdiction as court of first instance in relation to the enforcement of obligations under the Occupational Health and Safety Act 85 of 1993, confirming that, in this matter, it had no jurisdiction directly to enforce the general duties of employers in terms of s 8 of the OHSA as a court of first instance (*Public Servants Association on behalf of Members v Minister of Health & others* at 193).

## Jurisdiction — Bargaining Council Jurisdiction

The Labour Court has confirmed, in *Magoshi v Gauteng Department of Education & others* (at 168), that, on a less restrictive interpretation of 'employee' in the LRA 1995 and the extension of the protections of s 23 of the Constitution 1996, unfair labour practices may extend beyond termination of employment. However, the alleged wrong or unfairness must arise during the course of employment and before termination of that employment. In this matter the impugned process took place after the employee had resigned and was no longer an employee. The bargaining council therefore had no jurisdiction to determine the alleged unfair labour practice.

## Jurisdiction — CCMA Jurisdiction

The contracts of employment between the parties explicitly stated that law of Mozambique applied to the employment relationship. The employer approached the Labour Court to review a ruling by a CCMA commissioner, relying on the locality of the undertaking of the employer test, that the CCMA had jurisdiction to determine the employee's unfair dismissal dispute. The court found that there was no authority for the proposition that the locality of the undertaking test applied to every matter in which the issue of extra-territoriality arose, whatever the facts and circumstances. The parties explicitly agreed that the law of Mozambique applied in the various employment contracts they entered into and, in such circumstances, private international law principles did not arise. Effect had to be given, if the terms of a contract permitted, to the obvious intention and agreement of the parties. That applied no less to choice of law and chosen forum clauses in contracts (*Schenker SA (Pty) Ltd v Robineau & others* at 213).

In *Homani and C J Rance (Pty) Ltd* (at 224) the employee alleged that he had been dismissed for his religious beliefs. The CCMA commissioner determined that the employee had made a clear and unequivocal election as to the reason for his dismissal, and was satisfied that the employee's claim was for relief for an automatically unfair dismissal relating to religious beliefs in terms of s 187(1)(f) of the LRA 1995, which had to be adjudicated by the Labour Court.

In *SA Municipal Workers Union on behalf of Simon and Alfred Duma Local Municipality/Emnambiti Ladysmith Municipality* (at 250) the CCMA commissioner confirmed that s 10(6) of the Employment Equity Act 55 of 1998 provides that only employees earning below the threshold prescribed by the minister can have their unfair discrimination disputes arbitrated at the CCMA. It found that, for the purposes of determining the threshold applicable, the employee's salary rate at the date of referral of the claim to the CCMA and not at the date on which the dispute arose applies. In this matter, the employee's earnings were above the threshold at the time of referral, and the CCMA accordingly lacked jurisdiction to arbitrate.

## Jurisdiction — CCMA Dispute-resolution Functions in Exceptional Circumstances

The CCMA determined that it did not have jurisdiction to conciliate an unfair dismissal dispute and, exercising its powers under s 147, referred to dispute to a bargaining council. The council ruled that it did not have jurisdiction and, exercising its powers under s 51(4), referred the matter back to the CCMA. The Labour Court found that s 51(4) could not be read to encompass a situation where the CCMA had already referred the matter to a bargaining council in terms of s 147, rather it had to be read as a provision dealing with a referral which has been made to the council at first instance (*Schenker SA (Pty) Ltd v Robineau & others* at 213).

## Dismissal — Insubordination

An employee had been dismissed for refusal to obey a reasonable and lawful instruction. The Labour Appeal Court noted that the mere repetition of an instruction does not affect the true issue — the giving of an instruction and its defiance. ‘Persistence’ in this context means an absence of capitulation to the employer’s will, not exclusively a reference to repeated refusals. Therefore, defiance of authority can be proven by a single act of defiance.

The employer prerogative to command its subordinates is the principle that is protected by the class of misconduct labelled ‘insubordination’ and addresses operational requirements of the organisation that ensure that managerial paralysis does not occur (*TMT Services & Supplies (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* at 150).

## Dismissal — Breach of Trust

A senior employee at a university had been dismissed for lying under oath before an internal tribunal which had been established to enquire into his improprieties. The Labour Appeal Court confirmed that lies destroy trust and that, once the employee admitted that he had lied, the trust relationship was not capable of being restored (*University of KwaZulu-Natal v Pillay & others* at 158).

## Dismissal — Unauthorised Possession of Employer’s Property

An employee had been found in unauthorised possession of her employer’s property and was dismissed. In CCMA arbitration proceedings, the commissioner found that the employee had put forward a compelling defence that she was suffering from extreme stress and accepted the unchallenged evidence of a psychologist that the employee lacked criminal intent and had acted in an involuntary lapse of consciousness at the time. The commissioner found that, although the employee had indeed been in possession of the employer’s property, dismissal was not appropriate taking into account her mental state, her long service and her honest admission of possession from the outset (*Van Tonder and Estee Lauder Companies (Pty) Ltd* at 262).

## Disciplinary Code and Procedure — Conduct of Enquiry

In *Mashigo and Yanni Technologies (Pty) Ltd* (at 236) a CCMA commissioner found that there was a reasonable perception that the chairperson of the disciplinary enquiry had been biased against the employee. He also found that the documents relied on by the employer, which had been placed in dispute by the employee, had not been authenticated. The documents therefore constituted hearsay evidence and were inadmissible.

## Disciplinary Code and Procedure — More than One Enquiry

In both *Shosholozu Workers Union of SA on behalf of Spiers and Massbuild (Pty) Ltd t/a Builders Trade Express Warehouse Superstore* (at 254) and *Van Tonder and Estee Lauder Companies (Pty) Ltd* (at 262) the employers had conducted two disciplinary hearings into the same misconduct by their employees. In both arbitrations, the CCMA commissioners considered the jurisprudence relating to the holding of more than one enquiry. In *Shosholozu* the commissioner found that there were no exceptional circumstances justifying the holding of the second enquiry. However, in *Van Tonder*, the commissioner found that the holding of the second enquiry, where new evidence had been found after the first enquiry, benefitted both the employer and the employee, as it allowed her to an opportunity to explain her conduct.

### Practice and Procedure

In *Motsoaledi & others v Mabuza* (at 117) the Labour Appeal Court found that the third tier of government had neither the responsibility nor the power to give effect to an arbitration award against the second tier of government.

### *Quote of the Month:*

Sutherland JA in *TMT Services & Supplies (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2019) 40 ILJ 150 (LAC), when considering an employee's refusal to obey a lawful and reasonable instruction to attend a meeting:

‘The mere repetition of an instruction does not affect the true issue: the giving of an instruction and its defiance. This debate arose in the context of whether the appropriate degree of “persistence” was established. However, “persistence” is relevant to determining whether the employee indeed has defied the employer and not merely neglected to carry out instructions. It is thus an evidential instrumental tool to test a conclusion. The idea of “persistence” should not be allowed to slide into the basket of labour law myths which include the idea that an employee must be warned three times before disciplinary action can be taken. “Persistence” means an absence of capitulation to the employer’s will, not exclusively a reference to repeated refusals. Therefore, defiance of authority can be proven by a single act of defiance. There is no necessity for high drama and physical posturing to be present. The employer prerogative to command its subordinates is the principle that is protected by the class of misconduct labelled “insubordination” and addresses operational requirements of the organisation that ensure that managerial paralysis does not occur.’