

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Strike — Contempt of Court

The Labour Appeal Court, in *Association of Mineworkers & Construction Union & others v KPMM Road & Earthworks (Pty) Ltd* (at 297), found that the wording of an interdict ordering the union ‘to take all reasonable steps within its power’ to persuade the striking workers not to engage in unlawful conduct was vague and open to different interpretations. The employer had therefore failed to prove that the union had the requisite wilfulness required for a contempt order. It also found that the Labour Court’s reliance on common purpose to find the employees guilty of contempt was misplaced as the requirements for the application of the doctrine of common purpose had not been met.

Strike — Interference by Political Party in Workplace Issues

A political party, the EFF, had taken up the grievances and demands of employees at the employer, despite the fact that a recognised union had an established collective bargaining relationship with the employer. When the employer refused to engage with the union, the employees went on a go-slow and thereafter an unprotected strike. The employer obtained an interim interdict restraining the EFF from unlawfully interfering in its business. The employees were dismissed. On the return date, the Labour Court confirmed that political parties had no legal standing in workplaces and that their unlawful interference in workplace issues undermined orderly collective bargaining and dispute-resolution mechanisms which were the cornerstones of the LRA 1995. The court confirmed the rule nisi (*Calgan Lounge (Pty) Ltd v National Union of Furniture & Allied Workers of SA & others* at 342).

Dismissal — Automatically Unfair Dismissal

The employee claimed that she had been automatically unfairly dismissed on the grounds of age as contemplated in s 187(1)(f) of the LRA 1995 when her employer had compelled her retire at the age of 60 instead of 65 as stipulated in her employment contract. The Labour Court upheld her claim. However, on appeal, the Labour Appeal Court found that the employee's conduct led to a finding on the probabilities that she had earlier acquiesced to the change in the retirement age and that her employment had accordingly terminated at the age constructively agreed upon (*BMW (SA) (Pty) Ltd v National Union of Metalworkers of SA & another* at 306).

The employee claimed that she had been automatically unfairly dismissed on the grounds of her religion and belief as contemplated in s 187(1)(f) of the LRA 1995 when it dismissed her, a Seventh Day Adventist, for refusing to work on the sabbath, Saturday. The Labour Court upheld her claim. On appeal, the Labour Appeal Court was satisfied that the employee's religion was the real or dominant reason for her dismissal. Furthermore, the employer had failed to justify the discrimination on the basis that it was an inherent requirement of the job for the employee to work on Saturdays (*TFD Network Africa (Pty) Ltd v Faris* at 326).

Dismissal — By Operation of Law

A correctional services officer, who had been absent without authorisation for more than 30 days, was summarily dismissed in terms of clause 9.1 of Resolution 1 of 2006. Over a year later his representations to the department for reinstatement were rejected. The officer then referred an unfair dismissal dispute to the GPSSBC, where the arbitrator found that the employee had not been dismissed and that the council had no jurisdiction. Instead of approaching the Labour Court to review the arbitration award, the officer sought to review the department's refusal to reinstate him. The court found that the delay of 26 months from the department's decision until the filing of the review application was excessive and unreasonable and that the officer had provided no adequate explanation for the delay. It found further that, even considering the merits of the officer's challenge to the legality of the impugned decision not to reinstate him, that decision was rationally related to the purpose for which the power was given and was clearly justified. The legality challenge had no substance and had to fail (*Gcani v Minister of Justice & Correctional Services & others* at 358).

The employment of an employee of the Department of Home Affairs, who had been absent without authorisation for more than a calendar month, was terminated in terms of s 17(3) of the Public Service Act (Proc 103 of 1994). He referred an unfair dismissal dispute to the GPSSBC where an administrator decided that the employee had been dismissed *ex lege* and closed the file. The employee applied to the Labour Court for an order directing the GPSSBC to set the matter down for arbitration.

The court found that the administrator had not been appointed as an arbitrator to conciliate and arbitrate the dispute, but had made a clerical decision. This decision was not a ruling that was subject to review. The administrator's decision to close the file in fact had no legal effect; the dispute was therefore still live and had to be set down for arbitration (*Public Servants Association of SA on behalf of Mohlala v Minister of Home Affairs & others* at 415).

Dismissal — Probationary Employee

In the last month of the employee's probationary period, the employer's board resolved to extend his probationary period. The employee agreed to the extension, but later reneged on this agreement. He was subsequently dismissed following a disciplinary enquiry. In unfair dismissal proceedings, a CCMA commissioner found that the employer had failed to comply with item 8(1)(h) of the Code of Good Practice: Dismissal, that the employer had unilaterally extended the probation period and that the dismissal was unfair. On review, the Labour Court found that the commissioner had misconstrued the issue he had to address — the fairness of the employee's dismissal had to be determined on the grounds of misconduct and not on the basis that the employee was still on probation. The court confirmed that the employee's dismissal was substantively fair (*SA Library for the Blind v Commission for Conciliation, Mediation & Arbitration & others* at 422).

Dismissal — Existence of Dismissal

The employee, who worked in an elderly doctor's medical practice, claimed before the CCMA that she had been dismissed when the doctor closed his practice. The commissioner found that the evidence showed that the doctor's practice was in the process of being closed down, but had not yet closed and that the employee had still been expected to perform certain duties. The employee's dispute was therefore premature as no end date of her employment had been decided or communicated to her. The employee had failed to discharge the onus of proving that she had been dismissed (*Draghoender and Potgieter* at 463).

Termination of Employment — Automatic Termination

The municipality had engaged the services of community members through cooperatives in terms of its poverty alleviation programme. When the municipality lost the funding for its poverty alleviation scheme, it averred that this automatically terminated the employees' services. In unfair dismissal proceedings, a CCMA commissioner rejected the municipality's contention that the employees had been employed by the cooperatives — the municipality recruited the employees, supervised them, had the power to terminate their services and derived benefit from their services. It was therefore the true employer. The commissioner, on the evidence, also rejected the municipality's contention that the employees' employment was terminated automatically when the departmental grant was withdrawn (*Mlambo & others and Sizathina Co-operative* at 473).

Employment Relationship — Existence

The employee had applied for a position and had been verbally offered the job at an interview with the CEO of the respondent company. The salary and start date were agreed, but before he could assume duty, the CEO terminated his services. In unfair dismissal proceedings before the CCMA, the commissioner had to determine whether an employment relationship existed in the absence of a written contract of employment. The commissioner noted that a verbal agreement is valid if there is an intention to create a legal relationship; an offer and acceptance; agreed essentials of the contract (eg remuneration, duration, etc) and consensus on the rights and duties of the parties. The commissioner found that the employee was the more credible witness and that he had proved the existence of an agreement. The decision by the company not to honour the agreement constituted a dismissal (*Young and Barnes Group* at 479).

Collective Bargaining — Bargaining Agents — Minority Unions

In *Municipal & Allied Trade Union of SA v Central Karoo District Municipality & others* (at 386) the Labour Court confirmed the validity of agency shop agreements and that such agreements merely seek to make free riders pay for the fruits of the labour of the representative unions without compelling them to join those unions. It found that, where minority unions have been granted certain organisational rights by the CCMA, this does not render agency shop agreements unlawful or invalid merely because members of the minority unions have to pay both subscriptions to their union and agency fees to majority unions.

In *Solidarity v SA Police Service & others* (at 448) the Labour Court confirmed that the right of minority unions to seek to negotiate the terms of a collective agreement conferring organisational rights does not extend to unfettered access to the workplace to represent members in grievance or disciplinary hearings. In this matter the minority union did not rely on s 12 of the LRA 1995, which entitles union officials to enter an employer's premises to serve members' interests including representation of members at disciplinary and grievance hearings, but rather on the constitutional right to freedom of association. The court affirmed that, where legislation had been enacted to give effect to a constitutional right, the union could not bypass that legislation and rely directly on the Constitution 1996.

Collective Agreement — Agreement in terms of Section 197(6) of LRA 1995

In *National Union of Mineworkers & others v Anglo Gold Ashanti Ltd & another* (at 407) the Labour Court found that an agreement in terms of s 197(6) of the LRA 1995 to vary the provisions of a transfer of a business as a going concern is a collective agreement and is capable of extension to nonparties in terms of s 23(1)(d).

Unfair Discrimination — Race

In *Sasol Chemical Operations (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 436) the Labour Court found that in an unfair discrimination dispute the employee claiming discrimination based on race must produce sufficient evidence to support his or her claim — a mere allegation of discrimination is not enough. In this matter, the employee had not raised race as a ground for discrimination, but the CCMA commissioner had nonetheless found that there had been racial discrimination. The court found that discrimination had not been proved and that the commissioner had based his finding on an unarticulated claim by the employee. The award was reviewed and set aside.

Resignation — Withdrawal

The employee had resigned, but when he attempted to withdraw his resignation, the employer declined to accept the withdrawal and insisted that the employee leave on expiry of his notice period. In unfair dismissal proceedings, a CCMA commissioner confirmed that, once a resignation is accepted, this constitutes a binding mutual cancellation contract between the parties. The employee's termination of service did not, therefore, constitute a dismissal (*Asuelime and University of Zululand* at 456).

The employee, an organiser at the respondent union, had resigned, but the general secretary of the union convinced him to remain, and the employee subsequently withdrew his resignation. The union later insisted that he had resigned. In unfair dismissal proceedings, a CCMA commissioner found that an engagement wherein an employee is persuaded not to resign has the effect of restoring the employment relationship. Moreover, in this matter, the employee had been allocated duties after the expiry of his notice period and had performed those duties. The commissioner was therefore satisfied that the employee had been unfairly dismissed (*Mazibuko and Association of Mineworkers & Construction Union* at 467).

Labour Court — Jurisdiction

The Labour Court has found that an exemption from the wage provisions of a bargaining council main agreement by an exemptions appeal board established by the main agreement is not a function or act which is susceptible to review under s 158(1)(g) of the LRA 1995 (*National Union of Metalworkers of SA on behalf of Members v Metal & Engineering Industries Bargaining Council & others* at 399).

Practice and Procedure

The Labour Appeal Court has reaffirmed that a review application in terms of s 158(1)(h) of the LRA 1995 must be brought within a reasonable time. It found further that no formal application for condonation is required, but that the defaulting party is required to provide the court with an explanation for the delay and attempt to persuade the court to exercise its discretion to overlook the delay (*MEC for Economic Development, Environment & Tourism, Limpopo Province v Mogahlane* at 315). Similarly, in *Gcani v Minister of Justice & Correctional Services & others* (at 358), the Labour Court confirmed that a review application in terms of s 158(1)(h) must be brought within a reasonable time and the court set out the factors to be considered by a court when determining whether a delay is unreasonable or not.

Quote of the Month:

Snyman AJ in *Calgan Lounge (Pty) Ltd v National Union of Furniture & Allied Workers of SA & others* (2019) 40 ILJ 342 (LC):

‘The first question that must be asked is what was the EFF doing getting involved in workplace issues in the first place, especially considering that the applicant’s workplace is organised with the first respondent as majority representative and recognised trade union? The simple answer has to be that the EFF has no business in doing so. It is not a registered trade union. The deliberate and specific design of the LRA is to designate the task of dealing with workplace disputes and grievances to employers’ organisations, trade unions and workplace forums. There is no place in this structure for the involvement of political parties. In fact, it is my view that the practicing of any form of politics, be it under the guise of protecting employee rights or other socio-economic aspirations, in the workplace, is an untenable proposition. The workplace should be free of these kinds of influences.’