

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Dismissal — Incapacity — Contract in Contravention of Statutory Provision

The appellant, an employee of Armscor, had been dismissed in terms of s 37(2) of the Defence Act 42 of 2002 after he failed to qualify for any grade of security clearance as a result of a negative vetting by the SANDF. The Labour Appeal Court agreed with the Labour Court that the termination of the employee's service was based on supervening impossibility of performance which constituted a form of incapacity. However, the court found that s 37(2) could not be implemented independently of ss 39 and 41 of the Defence Act, which provided for the aggrieved employee to be afforded a reasonable opportunity to make representations regarding the refusal of a security clearance. The appellant's dismissal was therefore substantively and procedurally unfair (*Solidarity & another v Armaments Corporation of SA (SOC) Ltd & others* at 535).

Disciplinary Penalty — Consistency

In *Mtshwene v Glencore Operations SA (Pty) Ltd (Lion Ferrochrome)* (at 507) the Labour Appeal Court confirmed that an employer is entitled to distinguish between a senior employee and his subordinates for purposes of discipline. In this matter a refractory technologist had been dismissed for his failure to ensure the proper installation of refractory linings by a contractor which resulted in financial and production loss to the employer. As supervisor, the technologist was accountable for the work performed by the contractor and his subordinate, and the employer had correctly distinguished between the supervisor and his subordinate when disciplining and dismissing the technologist.

Disciplinary Code and Procedure — Enquiry

The Labour Appeal Court confirmed, in *National Union of Metalworkers of SA & others v Transnet National Ports Authority* (at 516), that the purpose of a disciplinary enquiry is to determine guilt and the appropriate sanction to be meted out to an employee. It found that nothing barred an employer in a case of collective misconduct from dealing with the employees involved as part of a collective and not as individuals, and this included calling for collective representations why striking employees should not be dismissed.

Labour Court — Jurisdiction and Powers

The Labour Court had granted an order, in terms of s 158(1)(c) of the LRA 1995, making an arbitration award an order of court. On appeal, the Labour Appeal Court restated the principles on when an appeal court will interfere with the discretion exercised by the court below. In this matter the LAC was satisfied that the employer's conduct had caused the delay in the employee bringing the s 158(1)(c) application and that the employer was opportunistic to claim on appeal that the court below had failed to exercise its discretion when granting the application (*PLSmidth Buffalo (Pty) Ltd v Hlakola* at 527).

The applicant employee, a municipal manager, approached the Labour Court to review, in terms of s 158(1)(a) of the LRA 1995, a decision by the municipal council to terminate his irregular appointment following instructions from the MEC in terms of s 54 of the Local Government: Municipal Systems Act 32 of 2000. The court found that the termination of the employee's contract constituted a dismissal as contemplated in the LRA that had to be processed in terms of s 191, and consequently that the court had no jurisdiction to entertain the challenge on review (*Mpele v Municipal Council of the Lesedi Local Municipality & others* at 572).

In an application to stay the enforcement of an arbitration award pending review of the award where the applicant employer had furnished security as contemplated in s 145(7) and (8) of the LRA 1995, the Labour Court found that, although the furnishing of security ordinarily suspends enforcement, the court nonetheless, in terms of s 145(3), retains a general discretion to stay or to refuse to stay enforcement of the award (*O R Tambo District Municipality v SA Municipal Workers Union on behalf of Mzamane & others* at 597).

Freedom of Association — Ban of Wearing Union T-shirts

In *National Union of Metalworkers of SA on behalf of Members v Transnet SOC Ltd* (at 583) the Labour Court found, inter alia, that the wearing of union T-shirts constituted a lawful activity as contemplated by s 5(2)(c)(iii) of the LRA 1995, and that the imposition of a ban on the wearing of union T-shirts was unlawful and invalid.

Demarcation — Review of Demarcation Award

In *Auto Industrial Group (Pty) Ltd & others v Commission for Conciliation, Mediation & Arbitration & others; Motor Industry Bargaining Council v Commission for Conciliation, Mediation & Arbitration & others* (at 550) the Labour Court considered whether demarcation awards were reviewable on the basis of correctness as well as reasonableness. In this matter, the CCMA commissioner had relied on a 1962 determination to find that certain manufacturers of motor vehicle parts fell within the scope of the MEIBC and not MIBCO. On review, the court found that the commissioner's finding that he was bound by a demarcation issued under the repealed LRA 1956 was a material error of law which rendered the award both wrong and unreasonable.

Contract of Employment — Fixed-term Contract — Termination

Where an employee had been employed on a one-year fixed-term contract which the employer declined to renew, a CCMA commissioner found that the employer had not proved any justifiable reason for fixing the term of the contract and, consequently, that the employer fell foul of the provisions of s 198B(5) of the LRA 1995 which provides that employment for a period in excess of three months without a justifiable reason for fixing the term is deemed to be indefinite. The commissioner found therefore that the employee was deemed to have been permanently employed and the termination of his contract constituted an unfair dismissal (*Inqubelaphambili Trade Union on behalf of Mokgatla and Clyronix (Pty) Ltd t/a Lentes & Marcos* at 648). Similarly, in *National Union of Metalworkers of SA on behalf of Louw & others and Eskom Holdings SOC* (at 668), a CCMA commissioner relied on s 198B(5) to find that employees engaged on fixed-term learnership contracts who remained on fixed-term contracts after qualifying without the employer providing any justifiable reason to fix the term of their contracts, were deemed to be indefinitely employed as from the date of qualification.

In *Keith-Bandath and Rhodes University* (at 653) the employee's one-year fixed-term contract was prematurely terminated on notice. The CCMA commissioner found that it was impermissible to cancel a fixed-term contract unilaterally during its currency in the absence of a material breach. The termination therefore constituted an unfair dismissal. Similarly, in *SA Transport & Allied Workers Union on behalf of Ntanta and Mayibuye Transport Co-operation* (at 678), the employee's one-year fixed-term contract was terminated before its expiry on the basis that the employee had reached retirement age. In unfair dismissal proceedings a bargaining council arbitrator confirmed that it was impermissible to cancel a fixed-term contract unilaterally during its currency in the absence of a material breach. Furthermore, nothing in law precluded parties from concluding a fixed-term contract past retirement age. The termination therefore constituted an unfair dismissal.

A service provider employer placed employees with a client in terms of fixed-term eventuality contracts, which were extended several times when the contract between the client and the employer was extended. On final extension of the contract by the client, the employer advised the employees of the termination of their services. In unfair dismissal proceedings, a CCMA commissioner found that the termination did not constitute a dismissal (*National Union of Metalworkers of SA on behalf of Phakathi & others and Sisonke Budpol Construction* at 673).

Contract of Employment — Fixed-term Contract — Renewal

The employment contract of an employee, who had been employed on a series of fixed-term contracts, was not renewed. In unfair dismissal proceedings he claimed that he had been promised permanent employment to replace another employee and that he therefore had a reasonable expectation of renewal as contemplated in s 186(1)(b) of the LRA 1995. A CCMA commissioner found that the employee's contract clearly stipulated who had the authority to renew or extend his contract, and that his reliance on promises made by a manager who had no such authority was unreasonable (*Kemp and Rhodes University* at 657).

Settlement Agreement — Review

In *Xaba & others v I G Tooling & Light Engineering (Pty) Ltd & others* (at 638) the Labour Court found that a settlement agreement concluded between the parties but not made an arbitration award could not be reviewed in terms of s 158(1)(g) of the LRA 1995.

CCMA Arbitration Award — Rescission

The Labour Court, in *SA Broadcasting Corporation v Commission for Conciliation, Mediation & Arbitration & others* (at 603), considered the meaning of ‘in the absence of any party’ in s 144(b) of the LRA 1995. It found that, where an attorney and his client had actively withdrawn from participating in an arbitration hearing but remained present in the hearing room, their mere physical presence did not preclude a finding that the proceedings had taken place in the absence of the party.

Costs — Labour Court

In *National Union of Metalworkers of SA on behalf of Members v Transnet SOC Ltd* (at 583) the Labour Court found that, even where parties are not collective bargaining partners, if an order for costs may prejudice the relationship between a trade union and an employer and render a difficult relationship even more fraught, it is in the interests of law and fairness not to award costs.

In several matters the Labour Court considered the circumstances in which an order of costs de bonis propriis would be appropriate. In *Sepheka v Du Pont Pioneer (Pty) Ltd* (at 613) the court granted costs against the applicant’s counsel on an attorney and client scale de bonis propriis after finding that counsel had made unsustainable and unwarranted attacks on the integrity of the court. In *Telkom SA SOC Ltd v Mashaba* (at 629) the court found that the failure by the employee’s attorneys to consider the applicable legislation and case law rendered an award of costs de bonis propriis appropriate. In *Xaba & others v I G Tooling & Light Engineering (Pty) Ltd & others* (at 638) the court found that, where the applicants’ attorneys had pursued a meritless application after being advised on the correct legal position, this warranted an award of costs de bonis propriis.

Practice and Procedure

After the respondent employee’s dismissal was found to be unfair and he had been reinstated and awarded compensation, the employee’s attorney calculated interest on the debt in terms of s 75 of the Basic Conditions of Employment Act 75 of 1997. He calculated interest on interest accrued on a monthly basis, thus coming to an amount which was excessive. In proceedings to set aside a writ issued for the amount, the Labour Court found that interest is to be calculated in accordance with s 1 of the Prescribed Rate of Interest Act 55 of 1975, which provides that interest on a judgment debt is simple interest calculated on a per annum basis on the capital amount (*Telkom SA SOC Ltd v Mashaba* at 629).

Quote of the Month:

Not awarded.