

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Disciplinary Code and Procedure — Delay in Finalising Internal Appeal

The Constitutional Court, in *Stokwe v Member of the Executive Council, Department of Education, Eastern Cape & others* (at 773), has found that the delay in finalising an internal disciplinary appeal does not per se constitute unfairness, but must be evaluated as an element in determining whether, in all the circumstances, it taints the overall fairness of the disciplinary process. In the matter before it the court found that the respondent department's excessive delay of several years in finalising the employee's disciplinary appeal procedure rendered her dismissal procedurally unfair.

Disciplinary Penalty — Dishonesty — Breakdown of Employment Relationship

The SAPS appeals authority overturned the disciplinary chairperson's finding that the respondent police officer be dismissed for dishonesty after he fraudulently changed the register to indicate that he had been at work when he was in fact absent. The SAPS unsuccessfully approached the Labour Court to review the decision in terms of s 158(1)(h) of the LRA 1995. On appeal, the Labour Appeal Court found that, where an employee in a position of considerable trust commits acts of dishonesty, the employment relationship breaks down irretrievably and dismissal is the only appropriate sanction. It therefore upheld the police officer's dismissal (*National Commissioner of the SA Police Service & another v Mphalele NO & another* at 806).

Prescription — Applicability of Prescription Act 68 of 1969 to Labour Litigation

In *National Union of Metalworkers of SA on behalf of Masana v Gili Pipe Irrigation (Pty) Ltd* (at 813), the Labour Appeal Court accepted, following the Constitutional Court judgment in *Food & Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd* (2018) 39 ILJ 1213 (CC), that the Prescription Act 68 of 1969 applies to all litigation under the aegis of the LRA 1995 and that there is therefore no rational basis to conclude that any aspect or stage of such litigation, including an arbitration award, is not subject to prescription.

Contract of Employment — Specific Performance

When the appellant company refused to honour a contractual obligation to pay the respondent employee post-employment commission, the employee brought an application to compel specific performance, which was granted by the Labour Court. On appeal, the Labour Appeal Court rejected the company's version that the contract was not authentic as implausible and riddled with contradictions and accepted the employee's version that the contract was authentic. It upheld the Labour Court decision that the employee had proved his claim and was entitled to specific performance in terms of the contract (*Workerslife Direct (Pty) Ltd v Maloka* at 841).

Strike — Picketing Rules

The Labour Court considered two applications in terms of s 69(12) of the LRA 1995 for urgent interim relief pending finalisation of picketing rules disputes in terms of s 69(8). In both matters the court considered the purpose of picketing rules and the ambit of the recently introduced s 69(8) and (12). In *Dis-Chem Pharmacies Ltd v Malema & others* (at 855) the court found that the Labour Court was empowered to suspend the right to picket where the conduct of strikers was in violation of the fundamental right to peaceful protest. In *Sibanye Gold Ltd t/a Sibanye Stillwater v Association of Mineworkers & Construction Union & others* (at 898) the court found that it was empowered to vary picketing rules established by the CCMA where the circumstances justified a change.

Employment Equity Act 55 of 1998 — 'Arbitrary ground' — Meaning

The Labour Court, in *Naidoo & others v Parliament of the Republic of SA* (at 864), considered the correct interpretation of the phrase 'on any other arbitrary ground' as it appears in s 6(1) of the Employment Equity Act 55 of 1998. It accepted and followed the narrow interpretation — in order for an alleged ground of arbitrary discrimination to qualify as such, it must, objectively, constitute a ground based on attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner to a listed ground.

Temporary Employment Service — Employer

A CCMA commissioner, relying on the Constitutional Court judgment in *Assign Services (Pty) Ltd v National Union of Metalworkers of SA & others (Casual Workers Advice Office as Amicus Curiae)* (2018) 39 ILJ 1911 (CC) where the court confirmed that after three months of employment, the client of the TES becomes the sole employer of the employees in relation to the LRA 1995, found that the employer/client had been correctly cited as respondent in a claim for unfair discrimination (*African Meat Industry & Allied Trade Union on behalf of Mkhungo & others and Corruseal Group & another (1)* at 911). In further proceedings between the same parties, the applicant union referred a dispute in terms of s 24(8) of the LRA seeking interpretation of a settlement agreement. The CCMA commissioner found that terms of the agreement, entered into by the union, the TES and the client, were clear and were agreed to by all parties. The relief sought by the union was in fact rectification and the setting aside of the agreement, and the CCMA lacked jurisdiction to grant such relief (*African Meat Industry & Allied Trade Union on behalf of Mkhungo & others and Corruseal Group & another (2)* at 919).

CCMA Arbitration Proceedings — Commissioner — Helping Hand Principle

The Labour Appeal Court confirmed that the purpose of the helping hand principle is to prevent a procedural defect by ensuring that there is a full ventilation of the dispute and a fair trial of the issues. This principle is reflected in clauses 20 and 21 of the CCMA Guidelines on Misconduct Arbitrations, which recognise that a CCMA commissioner is under a duty to lend a helping hand where procedural fairness requires. Failure to do so constitutes a gross irregularity (*Nkomati Joint Venture v Commission for Conciliation, Mediation & Arbitration & others* at 819).

CCMA Arbitration Proceedings — Jurisdictional Ruling

The Labour Court has found that, where new facts come to light after a CCMA commissioner has made a ruling declining jurisdiction, the commissioner is duty bound to correct the obvious error in his ruling. This power derives from s 144(b) of the LRA 1995, and the commissioner is not functus officio when he makes the new jurisdictional ruling (*Ntombela & others v United National Transport Union & others* at 874).

CCMA — Jurisdiction — Automatically Unfair Dismissal

Following their dismissal for various acts of misconduct during a protected strike, the employees referred an unfair dismissal dispute to the CCMA. The employer contended that the employees' conduct fell within the ambit of s 187(1)(a) of the LRA 1995 and that the CCMA did not have jurisdiction to determine an automatically unfair dismissal dispute. The commissioner, having noted the approach to be adopted to determine whether dismissals have arisen from participation in a strike, found that, in this matter, the most probable inference was that the employees would have been dismissed even without support for the strike. The strike was therefore not the sine qua non for the dismissals. The dismissals were not automatically unfair, and the CCMA had jurisdiction to arbitrate the dispute (*General Industries Workers Union of SA on behalf of Ramolobeng & others and Kharafi Hospitality (Pty) Ltd t/a Sheraton Pretoria Hotel* at 924).

In *Mkhize and Dube Transport* (at 929) the employee was dismissed for incapacity, but averred in unfair dismissal proceedings before the CCMA that the true reason for her dismissal related to her complaints of victimisation, bullying and harassment suffered at the hands of her line manager. The commissioner, in determining the true nature of the dispute, found that on the employee's framing of the dispute, it involved victimisation and fell within the ambit of s 187(1)(d) of the LRA 1995. The CCMA did not have jurisdiction to entertain the dispute.

Bargaining Council — Jurisdiction

The applicant was placed as a cleaner at a client of the employer. She was suspected of theft by the client who called the police. The employee was strip searched by the police and arrested. She referred a dispute to the BCCCI seeking compensation 'for disgrace' from the employer. The bargaining council arbitrator found that the employee's real dispute was that she was aggrieved by her treatment by the client and the SAPS and felt that her dignity had been affronted. The employer played no role in the incident, and the bargaining council accordingly had no jurisdiction to entertain the dispute (*Sithole and Sanitech Cleaning* at 942).

Dismissal — Existence of Dismissal

In *Van Noordwyk and Premier Consult (Pty) Ltd* (at 936) the CCMA commissioner found that the employee had failed to discharge the onus of proving that she had been dismissed. The commissioner accepted the version of the employer that he required the employee, who had been absent from work due to illness, to submit a medical certificate before resuming work.

Practice and Procedure

After a bargaining council upheld the employee's dismissal, the union acting on his behalf took the matter on review. The record was filed 20 months after launching the review and the matter was set down almost six years after it was launched. The Labour Court overruled the bargaining council award despite the employer's objection to the delay. On appeal the Labour Appeal Court confirmed that the Labour Court Practice Manual applied to lapsed review applications and, in terms of clause 11.2.7 of the manual, the application ought to have been archived when the necessary papers had not been filed within 12 months of the launch of the application. The court therefore found that, in the absence of a substantive application to reinstate the review application and to condone the undue delay, the court below had been obliged to strike the matter from the roll on the grounds of lack of jurisdiction (*Macsteel Trading Wadeville v Van der Merwe NO & others* at 798).

The Labour Appeal Court enumerated the factors to be considered in an application to condone the late filing of an appeal record. The court found that a litigant's explanation for the delay based on lack of funds does not automatically result in condonation being granted. In this matter the court refused to grant condonation where the appellant union had not made proper disclosure of its financial status to prove its financial distress (*Transport & Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd & others* at 827).

In *Centlec (SOC) Ltd v SA Municipal Workers Union & others* (at 846) the Labour Court restated the principles applicable to mootness. It found that, in this matter, where the striking employees' demands were still live despite the fact that they had agreed to return to work, the case was not moot and that the applicant employer was entitled to a declaratory order that the strike embarked on by the employees was unlawful and unprotected.

Quote of the Month:

Murphy AJA in *National Commissioner of the SA Police Service & another v Mphahlele NO & another* (2019) 30 ILJ 806 (LAC):

'Police officers and lawyers should always (not only in the discharge of their official duties) act honourably in a manner befitting their office, free from fraud, deceit and falsehood, and be virtuous in their behaviour. A police officer must maintain high standards of rectitude in private as well as in public life. A police officer, who in fulfilment of his or her duties is required to act against fraud, when he or she practices such in his or her own life, is a hypocrite. This inevitably will result in a total loss of confidence in the officer concerned, which could rub off on the SAPS more generally, adding to a loss of public confidence in SAPS.'