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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Suspension — Pre-suspension Representation

The Constitutional Court has confirmed that, where a suspension is precautionary and not punitive, an employer is not required to give an employee an opportunity to make representations (*Long v SA Breweries (Pty) Ltd & others* at 965).

Jurisdiction — Legality Review

In two applications by MECs challenging the lawfulness of the appointment of municipal managers in terms of s 54A of the Local Government: Municipal Systems Act 32 of 2000, the High Court found that the matters did not arise out of the LRA 1995 but the Systems Act, and were consequently not labour matters falling within the exclusive jurisdiction of the Labour Court (*Mawonga v Walter Sisulu Local Municipality & others (Institute for Local Government Management of SA intervening)* at 974 and *MEC for the Department of Co-operative Governance & Traditional Affairs v Nkandla Local Municipality & others; MEC for the Department of Co-operative Governance & Traditional Affairs v Mthonjaneni Local Municipality & others* at 996).

Local Authority — Municipal Manager — Appointment

In two applications before the High Court, MECs challenged the lawfulness of the appointment of municipal managers in terms of s 54A of the Local Government: Municipal Systems Act 32 of 2000. In *Mawonga v Walter Sisulu Local Municipality & others (Institute for Local Government Management of SA intervening)* (at 974) where the applicant's contract as municipal manager was renewed before its expiry without the post being advertised nationally and without following a competitive process, the court found that the decision to renew was unlawful and ultra vires s 54A(4) of the Systems Act. In *MEC for the Department of Co-operative Governance & Traditional Affairs v Nkandla Local Municipality & others; MEC for the Department of Cooperative Governance & Traditional Affairs v Mthonjaneni Local Municipality & others* (at 996) where the persons appointed as municipal managers did not have the managerial experience required by s 54A(3) of the Systems Act, the court found that the appointments were unlawful and null and void.

Local Authority — Disciplinary Proceedings Against Managers

Where the chief financial officer misappropriated municipal funds during his first term of office, but the municipality only instituted proceedings during his second term, the Labour Court rejected the CFO's challenge that the municipality had waived its right to discipline him — the municipality had only become aware of the misappropriation after the appointment of the CFO for the second term, and could therefore not have waived its right to charge him before it became aware of the misconduct (*Maluleke v Greater Giyani Local Municipality & others* at 1061).

Where the municipal manager and chief financial officer, who had unlawfully invested R150 million in municipal funds in VBS Bank, were suspended pending investigation, the Labour Court found that their precautionary suspension met the requirements of regulation 6 of the Local Government: Disciplinary Regulations for Senior Managers 2010. The court, taking into consideration the employees' senior positions, the serious nature of the allegations against them, the possibility that they could adversely influence the investigation, the public interest in ensuring that allegations of corruption and mismanagement at the highest level of the public service were acted against swiftly and efficiently, found that the suspensions were both fair and lawful (*Mothogoane & another v LepelleNkumpi Local Municipality & another* at 1072).

Disciplinary Penalty — Serious Misconduct

A senior municipal employee was dismissed following a physical altercation with a colleague. The Labour Appeal Court found that his misconduct was of such a serious nature that his length of service and clean disciplinary record could not save him from dismissal (*Nelson Mandela Bay Metropolitan Municipality v Independent Municipal & Allied Trade Union on behalf of Tshabalala & others* at 1021).

The SA Rugby Union's manager for referees was dismissed for serious misconduct which was unacceptable to both his employer and his colleagues. The Labour Appeal Court found that progressive discipline was unlikely to bring about a change in the employee's behaviour and that dismissal was the only appropriate sanction (*SA Rugby Union v Watson & others* at 1052).

Dismissal — Unlawful Dismissal

The employee, the son of one of the Gupta brothers, brought an urgent application in the Labour Court seeking an order declaring his dismissal unlawful and void ab initio, claiming that he was only dismissed because of his family membership and that offended the equality clause in the Constitution 1996. He contended that the court had concurrent jurisdiction with the High Court in terms of s 157(2) of the LRA 1995. The court found that, in determining whether the Labour Court had jurisdiction under s 157 of the LRA, the correct approach was to start with s 157(1) and not, as the employee had done, to proceed straight to s 157(2) in an effort to claim jurisdiction for a claim based on the breach of an obligation under the LRA while disavowing the Act's processes and remedies. Consequently, the court found that it did not have jurisdiction over the claim pleaded by the employee (*Singhala v Ernst & Young Inc & another* at 1083).

Retrenchment — Alternatives to Retrenchment

In unfair labour practice proceedings relating to promotion a CCMA commissioner ordered the employee's reinstatement in position that did not exist when he was retrenched. On review, the Labour Court noted that it was legitimate for an employer to institute a competitive process for appointment to a new post in a restructured organisation in an attempt to avoid retrenchment of employees whose positions had become extinct. The court found that in this matter the failure to place the employee whose position had been rendered redundant owing to restructuring in a senior alternative position did not constitute an unfair labour practice dispute relating to promotion, and his non-placement had to be challenged in terms of s 189 of the LRA 1995 (*Telkom SA Ltd v Commission for Conciliation, Mediation & Arbitration & others* at 1093).

When the employer embarked on a retrenchment of an entire department, it entered into an agreement with the employees that they would assist in the hand-over of their tasks and be given extended exit dates. The employees refused to fulfil their obligations and were retrenched before the extended exit dates. The employer hired temporary staff to complete the hand-over. The Labour Court found that it was untenable to contend, as the employees did, that the failure to offer the temporary positions to them rendered their dismissals unfair — the positions only existed because of their own obstructive conduct (*Van Vuuren & others v Modelez SA (Pty) Ltd* at 1106).

Reinstatement — Consequences

In *Pikitup Johannesburg (SOC) Ltd v Mutero* (at 1030) the Labour Appeal Court confirmed that reinstatement revives the contract of employment terminated by dismissal and places the employee back into the same job or position occupied before dismissal on the same terms and conditions. The court found, however, that, as an employee had no contractual entitlement to a discretionary bonus, the Labour Court had erred in ordering payment of an average bonus for the years between his dismissal and reinstatement.

Unfair Discrimination — Equal Pay for Work of Equal Value

In *African Meat Industry & Allied Trade Union and Premier FMCG (Pty) Ltd* (at 1122) the CCMA commissioner found that, although the employees were able to show that pay differentials existed, they were unable to show that the differences were arbitrary or manifested naked preferences which served no legitimate purpose. In *Ncongwane and Emakhazeni Local Municipality* (at 1153) the CCMA commissioner found that, where the comparators relied on by the employee were not appropriate as the roles and responsibilities of the comparators were different to hers, it was clear that the work performed was not of equal value and no discrimination had been shown.

Unfair Discrimination — Arbitrary Grounds

In several matters the CCMA restated the law relating to unfair discrimination on an arbitrary ground. In *Democratic Municipal & Allied Workers Union of SA on behalf of Daniels & another and City of Cape Town* (at 1136) the employees claimed that the refusal to appoint them to permanent positions because they were implicated in ongoing investigations constituted unfair discrimination on an arbitrary ground. The commissioner found that a general investigation into wrongdoing cannot constitute an arbitrary ground for discrimination — there was no evidence that the employees were treated differently from others implicated in wrongdoing and they also failed to show that the investigation was capricious or morally offensive.

In *Molaba and Goldfields TVET College* (at 1142) the employee claimed that the failure to offer him permanent employment on the basis of ill-health constituted unfair discrimination on an arbitrary ground. The commissioner found that on the undisputed facts the employee had proved that he had been treated differently on a ground that had the ability to impair his fundamental human dignity. In *Private Sector Workers Trade Union on behalf of Opperman and Gerrie Ebersohn Attorneys* (at 1159) the employee claimed that she had been unfairly discriminated against on the basis of qualifications. The commissioner found that there was no evidence that the employee had been treated more harshly than others because she lacked qualifications.

Appeal — Application to Enforce Judgment Pending Appeal

The Labour Appeal Court confirmed that the purpose of s 18 of the Superior Courts Act 10 of 2013 is to provide generally for suspension of final orders pending appeal, but to allow exceptionally for interim execution on fulfilment of the strict criteria set out in the section. In this matter the court found that it was impermissible for the Labour Court to make an order declaring an entity to be the new employer in terms of s 197 of the LRA 1995 and also to order payment of employees' remuneration pending final determination of the matter without applying s 18 (*Road Traffic Management Corporation v Tasima (Pty) Ltd & others* at 1036).

Quote of the Month:

Mahosi J in *Maluleke v Greater Giyani Local Municipality & others* (2019) 40 *ILJ* 1061 (LC), when commenting that the court would not countenance illogical arguments by a party:

'What the applicant in fact does is throw mud balls at the wall and hope that one of them will stick.'