IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG.

Case No. JA 1/05

In the matter between

Netherburn Engineering CC **Appellant**
t/a Netherburn Ceramics

And

Robert Modau N.O **First Respondent**
Commission for Conciliation, Mediation
And Arbitration

Jane Moabelo **Second Respondent**

JUDGMENT

ZONDO JP

Introduction

[1] I have had the benefit of reading the judgment prepared by Musi JA in this matter. I agree with him that the appeal falls to be dismissed. However, the approach I adopt to dispose of the matter is somewhat different from the approach he has adopted. For that reason I set out below my reasons for the conclusion that the appeal falls to be dismissed.

[2] This is an appeal against part of a judgment of the Labour Court in an application in which the appellant sought certain orders including an order the effect of which would have been a declarator that there is an absolute right to legal representation for parties appearing before the Commission for Conciliation, Mediation and Arbitration ("**the CCMA**") in arbitrations relating to disputes about dismissals for misconduct and incapacity. The appeal was unopposed but, after hearing argument, this Court requested Mr MJD Wallis SC of the Durban Bar to act as amicus curiae so that we could have the benefit of different arguments. Mr Wallis kindly agreed to assist the Court in this way and, with the assistance of his junior, Mr P.J Wallis, he furnished us with very extensive written argument which we have found very helpful. This Court is deeply indebted to Mr Wallis and his junior for their assistance.

[3] The third respondent in this matter was previously employed by the appellant but was dismissed for misconduct. A dispute arose between the appellant and the third respondent about the fairness of that dismissal. The dispute was referred to the CCMA, the second respondent in this matter, for conciliation. After conciliation had failed, the first respondent, a commissioner of the CCMA, was assigned to arbitrate the dispute.

Proceedings in the CCMA

[4] On the date of the arbitration, the managing member of the appellant, Mr Featherstone, brought along to the arbitration an attorney, Mr Higgins, to represent the appellant. The third respondent was represented by Mr Sibiya, an official of a trade union called South African Scooter and Transport Allied Workers

Union. Mr Sibiya objected to the appellant being represented by an attorney. It seems that the appellant's attorney thereupon moved an application from the bar asking the commissioner to allow the appellant to be represented by an attorney. It was competent to move such an application in the light of the provisions of sec 140(1) of the Labour Relations Act, 1995 (Act 66 of 1995) ("**the Act**").I do not propose to quote those provisions at this stage in this judgment but will do so in due course.

[5] Mr Sibiya opposed the application. The application was based on an allegation that Mr Sibiya was an experienced trade unionist who had previously appeared in many labour disputes before different tribunals whereas Mr Featherstone would be handling such a matter on his own for the first time if the appellant was not allowed legal representation. The commissioner dismissed the application on the basis that he had considered the relevant statutory factors relevant to the exercise of his statutory discretion to allow or refuse legal representation and found that there was no proper basis to allow the appellant to be represented by an attorney.

[6] After the commissioner had refused the appellant's application to be allowed to be represented by an attorney, the commissioner was asked to postpone the arbitration pending a review application which the appellant wanted to bring in the Labour Court to have his ruling set aside. The commissioner also refused the application for a postponement. Thereafter both Mr Featherstone and Mr Higgins left the arbitration proceedings. The commissioner continued with the arbitration in the absence of the appellant. The commissioner subsequently issued an award in terms of which he

found that the third respondent's dismissal was unfair and ordered the appellant to reinstate her with immediate effect and pay her a certain amount by way of compensation.

Review application in the Labour Court

[7] The appellant subsequently brought an application in the Labour Court to have the decision of the commissioner reviewed and set aside. The Labour Court, through Landman J, dismissed that application. No order as to costs was made. The Labour Court later granted the appellant leave to appeal to this Court against its order. Hence, this appeal.

The appeal

[8] When the commissioner made his decision refusing the appellant's application for leave to be represented by an attorney, sec 140(1) of the Labour Relations Act 66 of 1995 ("**the Act**") provided as follows with regard to legal representation in arbitrations relating to disputes about dismissals for misconduct and incapacity:

"(1) **If the dispute being arbitrated is one about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties, despite section 138 (4), are not entitled to be represented by a legal practitioner in the arbitration proceedings unless –**

(a) the commissioner and all the other parties consent;

(b) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering –

(i) the nature of the questions of law raised by the dispute;

(ii) the complexity of the dispute;

(iii) the public interest; and

(iv) the comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute."

[9] Sec 140(1) was subsequently repealed but the CCMA Rules which were subsequently promulgated contained provisions that are materially the same as the repealed provisions of sec 140(1) of the Act. Furthermore, the repealed provisions of sec 140 became part of transitional provisions.

[10] A study of sec 140(1) reveals that the general rule in terms of sec 140(1) of the Act is that there is no right to legal representation in arbitrations relating to disputes concerning dismissals for misconduct or incapacity. However, there are certain exceptions to that general rule. The exception provided for under par (a) is that a party to such arbitration proceedings is entitled to legal representation if the commissioner and all other parties agree that it be represented by a "**legal practitioner**". The exception provided for in par (b) relates to a situation in which the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation after considering certain factors which are listed in subparagraphs (i) to (iv). Those factors are the nature of the questions of law raised by the dispute, the public interest and the comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute.

Par (a) did not apply. Under paragraph (b) only (iv) seems to have been relied upon by the appellant to contend that it be granted leave to be represented by an attorney. Although in the founding affidavit in the review application, the deponent thereto said that the dispute was complex, he did not substantiate that statement nor has it ever been subsequently substantiated. This means that the commissioner had to deal with the application for leave to be represented by an attorney in circumstances where sec 140(1)(a) did not apply nor did sec 140(1)(b)(i), (ii) and (iii).

[11] The appellant indicated in its heads of argument that how the commissioner exercised his discretion was no longer being challenged in these proceedings. If one were to proceed on the basis that the commissioner could grant or refuse a request for legal representation in accordance with the provisions of sec 140(i)(b), there would be no doubt that, having regard to the appellant's founding affidavit, the appellant failed to make out a case. The terms of sec 140(1) are such that, since its request for leave to be represented by an attorney would have been based on sec 140(1)(b), the appellant would have had to persuade the commissioner to make the conclusion envisaged in sec 140(1)(b) because, without such a conclusion, the appellant could not be granted leave to be represented by an attorney. That conclusion would be to the effect that it would be unreasonable to proceed with the arbitration without the appellant being represented by an attorney. In its founding affidavit the appellant did not even begin to make out such a case.

[12] What the appellant's case really is seems to keep changing from time to time. Its case before the Labour Court and before us was that it had an "**absolute**" right to legal representation in the arbitration proceedings before the commissioner in this case. That was not its case before the CCMA when it applied for leave to be allowed to be represented by an attorney in those proceedings. This is apparent from a reading of those parts of the founding affidavit in which the deponent explained what happened in those proceedings. When one reads the founding affidavit – which is where the appellant was required to make out its case since the proceedings in the Labour Court were motion proceedings – one will see that it is not the appellant's case that sec 140(1) of the Act is unconstitutional and that the appellant sought to have it declared unconstitutional.

[13] A submission is made in par 4.19 without any substantiation at all that the appellant "**has a constitutional right to legal representation**" "**especially so as the CCMA is not a voluntary process (sic) but one which is forced upon employers.**" It was not pointed out in the founding affidavit where in the Constitution that right to legal representation is provided for. And yet at page 14 of the judgment of the Labour Court (p. 105 of the record) that court recorded that it was the appellant's case "**that s 140(1) of the LRA (as it read at the time of the arbitration proceedings) is inconsistent with the provisions of the Constitution of the Republic of South Africa 108 of 1996 and that this Court should therefore make an order declaring that s140(1) is constitutionally invalid. See section 172(2) of the Constitution**." I pause here to point out that in the notice of motion no such relief

was sought and in the record there is no evidence that an application was made to seek an amendment of the relief sought in the Notice of Motion. That being the case, Counsel for the appellant who appeared in that Court – not the Senior Counsel who appeared for the appellant before us – must have sought that order in oral argument.

[14] Mr Wallis understood that this was the appellant's case and dealt with the matter on that understanding in his written argument but Counsel for the appellant, in their written reply thereto, made it clear that they did not seek an order striking sec 140(1) down as unconstitutional. However, they conceded that in par 1.3 of the appellant's heads of argument the appellant said that its attack was against the validity of sec 140(1) of the Act and that the section is unconstitutional. In fact par 1.3 of the appellant's heads of argument reads thus:

> **"In the current proceedings the appellant makes nothing of the manner in which the arbitrator exercised the discretion conferred by sec 140 to deny a litigant the right to legal representation in proceedings before the CCMA. Instead the appellant attacks the validity of the section itself: it contends, as it did before Landman J, that the section is unconstitutional."**

[15] In its written argument submitted in response to Mr Wallis' written argument, the appellant says it is not true that it seeks an order that strikes sec 140(1) of the Act down. It says in paras 5.1 and 5.2 of that reply:

"5.1 What Netherburn submits is that the first respondent ("the Commissioner"), in basing his decision rejecting the application for legal representation on s 140(1), brought into account a legal provision that is constitutionally invalid and so-committed a reviewable irregularity.

5.2 **CCMA commissioners have no power to make an order declaring a statutory provision to be unconstitutional, for they do not enjoy the status of a superior court. They do, however, have the power to decline to enforce the provisions of a statute that violate the Bill of Rights and this is so whatever the nature of the statute."**

5.3 In the resulting review, the Labour Court has the same power and, in addition, at least the power to strike down the section on the grounds that it was a provision in a labour statute that violated the Bill of Rights. So much as we have already pointed out, is conceded by the amici. In the ensuing appeal this Court naturally has at least the selfsame power. The power is one that arguably should be exercised if the court concludes that s 140(1) of the LRA does indeed constitute a violation but its exercise is of no direct relevance to the present appeal.

5.4 **It follows that, in these proceedings, it is a matter of no consequence whether, in the face of a violation of the Bill of Rights, the court has power to strike down the offending section or not. The true question is whether a court or tribunal has jurisdiction to decline**

> **to enforce a statutory provision that it considers to constitute such a violation. Every adjudicative body, whatever its nature, has such jurisdiction."**

The case which the appellant now pursues in terms of the above written response to Mr Wallis written argument is completely different from the case which is contained in its founding affidavit in the review application in the Labour Court. Its case in the founding affidavit is reflected in paragraphs 12 and 13 above.

[16] That is a different case from the case that one finds in the appellant's notice of appeal as being the appellant's complaint against the judgment of the Labour Court. In par 1.4 of the notice of appeal the appellant stated its complaint as being that the learned Judge in the Court a quo "**erred in that he failed to find**:

> **1.4 that section 140(1) constitutes such an enactment, cannot be so justified and, being in contravention of the Constitution, must be struck down as void."**

Indeed, in a letter addressed to the Minister of Labour dated 24 March 2005 which is in the record the appellant's attorney inter alia said:

> **"In so far as our client intends challenging the constitutionality of Section 140 of the Labour Relations Act 66 of 1995, albeit repealed, you are invited to join or intervene in the matter."**

That letter was written after the Court a quo had granted the appellant leave to appeal. Some time earlier – in 2002- when the matter was still pending in the Labour Court, Sutherland AJ, sitting in the Labour Court, had issued an order by consent postponing the

matter sine die. Paragraphs 2, 4 and 5 of the order that he issued on that occasion read as follows:

> "1. ……
>
> 2. **By consent it is directed that all issues constitutional and non-constitutional will be argued when the matter is set down again.**
>
> **3. …**
>
> **4. The Minister of Labour will take such steps as he deems fit to join this application as a party within 30 days of the date of this order.**
>
> **5. The Minister, if he joins the application, shall within 10 days of joining file such papers as he deems appropriate in terms of the rules of the Court."**

[17] It must also be pointed out that, when the appeal was argued before us by the appellant's Counsel, he handed up a draft order which he asked us to grant if we were inclined to uphold the appeal. The relevant orders that were sought by the appellant in terms of that draft order read thus:

> **"1. The appeal against the order of Landman J in the Court a quo dated 22 August 2003 confirming the first respondent's ruling in terms of s 140(1) of the Labour Relations Act 66 of 1995 ("the Act") that the appellant is not entitled to legal representation is upheld and his order is set aside.**
>
> **2. In terms of s 172(2) of the Constitution Act 108 of 1996 ('the Constitution') –**

2.1 section 140(1) of the Act is declared to be inconsistent with the Constitution and is accordingly invalid to the extent that s140(1) of the Act fails to accord a party to a dispute about a dismissal related to conduct or capacity with an absolute right of legal representation;

2.2 section 140, as it stood prior to its repeal, is deleted in its entirety."

There were other orders sought in the draft which related to this Court directing the Registrar of this Court to lodge a copy of its order with the Registrar of the Constitutional Court. It is not necessary to quote those orders.

[18] The result is that in the notice of motion and the founding affidavit the appellant sought to pursue one case. In oral argument before the Labour Court it pursued a different case. In the notice of appeal it sought to pursue the same case it had pursued in oral argument before the Labour Court. Before us in oral argument it pursued the same case that it had pursued in oral argument before the Labour Court which was different from its case in the papers. After reading Mr Wallis' written argument in response to the oral argument it had pursued before us in the absence of opposition, the appellant changed its mind and informed us and Mr Wallis in its replying written argument that its case was not the one it had in fact pursued in oral argument but was another one. That other one was a new case altogether.

[19] The frequency with which the appellant's case has been changing in this matter as the case proceeded at different stages of its

journey reminds me of what Lord Russell of Killowen said in Electric and Musical Industries, Ld and Boonton Research Corporation, Ld v Lissen, Ld and Another 56 R.P.C 23 (HL) at 40 lines 24-35 about "**those who seek to depart from the natural meaning of language …**". That was a case concerning the infringement of a patent and the construction of a patent specification. There Lord Russell said:

> "**The Appellants, however, contend for a narrow construction and, as is usually the fate of those who seek to depart from the natural meaning of language and to read in words which are absent, the contention seems to vary from time to time. They sometimes say it is limited to a method of controlling amplification when used for the purpose of accommodation weak and strong signals. They sometimes say it is limited to a method of amplification by the use of a valve having a characteristic curve which possesses what has been called a long tail and which can be operated on throughout its whole length without introducing excessive distortion. In the argument before your Lordships it was contended that the claim was limited to a method of adjusting transmission which consists of variation of amplification as distinct from amplification simpliciter."**

[20] In the light of all of the above there can be no doubt that for some time the appellant sought an order striking down sec 140 as being inconsistent with the Constitution. It could not have been open to it to argue for such an order on the papers that it had filed in the review application which did not contain such a case. What I have

set out above demonstrates that in so far as the amici understood the appellants' case to be one in terms of which sec 140 of the Act would be struck down, they were not in error. It is the appellant's Counsel who are in error when they say that that was not their case.

[21] As I have said above the appellant now says it does not seek an order striking down sec 140. So what order does it seek and what is its case? I guess I should go to the appellant's notice of appeal to find out what order it seeks which it says the Labour Court should have made instead of the order that it made. The first error that the appellant says in its notice of appeal the Court a quo made was in finding that "section 140 of the Labour Relations Act 66 of 1995 ("**the LRA")** "**is in conformity with the provisions of the Constitution of the Republic of South Africa 108 of 1996 ("the Constitution") despite its prohibition on the legal representation of a party unless the conditions in the section are satisfied**."

[22] In paragraphs 1.1 to 1.4 of the Notice of Appeal the appellant sets out what it says the Court a quo erred in not finding. Paragraphs 1.1 to 1.4 are to the effect that the Court a quo erroneously failed to find that:

> "1.1 **sections 1(c), 23(1), 33(1) and 34 of the Constitution or one or other of them ('the Bill of Rights provisions') confer, at the very least, a general right to representation by a lawyer in proceedings before a public body in which the rights of a person are positively determined;**

1.2 the Bill of Rights provisions amend the common law to the extent that it recognizes no such general right;

1.3 **that a statutory enactment can place no general prohibition on such right of representation nor impose a general requirement on a litigant to justify his or her entitlement to such representation unless such limitation is justified under section 36 of the Constitution;**

1.4 **that section 140(1) constitutes such an enactment, cannot be so justified and, being in contravention of the Constitution, must *be struck down as void***;"

Other alleged errors of the Court a quo are set out under paragraph 2 of the notice of appeal but they all have one aim and one aim only and that is that, because of those alleged errors, the Court a quo failed to conclude that sec 140 is inconsistent with sections 1(c), 23(1), 33(1) and 34 of the Constitution.

[23] The appellant's case now is that it does not seek an order striking down sec 140 but, whatever its case is, it says it seeks that the Court should conclude that sec 140 is unconstitutional in the light of the sections of the Constitution referred to earlier. The question that arises is: Suppose, for the sake of argument, that we reach that conclusion, what order should we then make if we are not asked to strike sec 140 down? In par 8.2 of the appellant's written argument in response to the amici's written argument the appellant states in the last sentence thereof that **"(t)he argument mounted on behalf of [the appellant] is that the restriction [to legal representation in sec 140] constitutes a violation of the Bill of Rights and, being unconstitutional, should not be enforced**." In the light of

all of the above it would seem that the appellant's case is that because, in its contention, sec 140 is unconstitutional, the commissioner should have declined to enforce it and that his failure to refuse to enforce it constitutes a reviewable irregularity. The appellant contends that, therefore, the order that should be made would then be one setting aside the arbitration award issued by the commissioner and remitting the dispute to the CCMA to be arbitrated afresh by another commissioner who will have to allow the appellant to be represented by an attorney.

[24] The above approach is premised on the allegation that the commissioner committed a reviewable irregularity in failing to refuse to act in accordance with sec 140 of the Act. In other words the appellant is saying that the commissioner should have ignored sec 140(1) and dealt with the matter on the basis that the appellant had an absolute right to legal representation before him for which it did not need to apply.

[25] Two difficulties immediately present themselves to me about this case that the appellant now seeks to argue. The first one is that this is not part of the case foreshadowed in the appellant's founding affidavit. The application papers that were served on the commissioner, on the basis of which he would have decided that he was not going to oppose the appellant's application in the Court a quo did not give him notice that this was part of the bases upon which the appellant would seek to have his award reviewed and set aside. He was told of a completely different case. The appellant's case as foreshowed in the founding affidavit attacked his failure to grant the appellant legal representation because of a supposed

disparity in the abilities of Mr Featherstone and Mr Sibiya and not because sec 140 was an unconstitutional provision which he should have ignored. In my view it is not open to the appellant to now argue a case which it did not foreshadow in its founding affidavit, particularly where the new case is based on blaming the commissioner for not doing something that he was not asked to do. He has not been given an opportunity to defend himself against that accusation. To allow the appellant to argue such a case would offend the *audi alteram partem* rule because, if the commissioner and the employee side were to have been notified of this new case in the founding affidavit, they may have decided to oppose or to file affidavits.

[26] When you are a party to a dispute or when you were the arbitrator or presiding officer in some proceedings and one of the parties brings a review application, you, of course, read the papers to understand what the applicant's case is and to decide whether to oppose or to consent to the order sought or to abide the decision of the Court. What you do will depend partly upon the view you take of the applicant's case as disclosed in the papers. If, after reading the applicant's papers, you conclude that there is absolutely no case for you to answer in the light of the contentions or the grounds of the application as disclosed in the founding affidavit and you decide to abide the decision of the Court, you would feel legitimately aggrieved if you subsequently learn't that the award was set aside by the Court not on the grounds contained in the founding affidavit but on grounds that were advanced in oral argument which were not foreshadowed in the founding affidavit and without you being afforded an opportunity to oppose the new

case. On my understanding the rule that in motion proceedings the applicant must make his case in his founding affidavit and that you stand or fall by your papers has not been abolished and still applies. It serves a very useful purpose in terms of fairness.

[27] There is nothing that can be done to remedy that situation now because the commissioner cannot be invited to say something about that at appeal level. This Court is sitting in judgment of the judgment of the Labour Court and, as a general rule, it must decide the appeal on the basis of the same information that was before the Labour Court. Before the Labour Court the commissioner had not been given notice of such point so that he could be given an opportunity, if he so desired, to file an affidavit defending himself against such an allegation. On the basis of this point alone, I would conclude that the appeal falls to be dismissed because the alleged unconstitutionality of sec 140 of the Act constitutes the sole and entire basis of the appellant's appeal. If that attack falls outside the case foreshadowed in the papers that would be the end of the appeal.

[28] In the approach I have taken in this matter I am fortified by what the Constitutional Court recently said in par 67 of its as yet unreported judgment in CUSA v TAO YING Metals Industries and others, case no CCT 40/07 handed down on the 18th September 2008. In par 67 that Court said in part through Ngcobo J:

> "**In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant**

> **<u>may not on appeal raise a new ground of review.</u> To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible."**

[29] In my view the principle affirmed by the Constitutional Court in this passage applies with equal force to both arbitration awards and other rulings that commissioners of the CCMA may be called upon to make in the process of arbitration or on preliminary points when such rulings or awards are taken on review to the Labour Court. The principle also means that a party is bound by the grounds of review contained in the review application unless it has subsequently amended or supplemented them which it can do with the leave of the Court or if the Rules of Court permit. Ngcobo J said at par 68 of the CUSA judgment that there was one qualification to the principle contained in the passage quoted above. That is a qualification to the principle stated in the first two sentences of par 67. That principle is: "**Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award**." The qualification was stated in par 68 thus:

> **"These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero***

***motu*, to raise the point of law and require the parties to deal therewith."**

[30] What the Constitutional Court said in paragraphs 67 and 68 about the role of a review court is true of a party in motion proceedings in general including a review application. In motion proceedings a part stands or falls by his papers. Accordingly, a party which brings a review application is bound by the grounds of review set out in his founding papers. He cannot in oral argument argue on the basis of different grounds of review except if such ground can be said to be apparent from the review application. In this case the applicant does not pursue the grounds of review contained in the founding affidavit but seeks to argue the case on the basis of grounds which are nowhere to be found in the review application. The grounds it seeks to pursue are not grounds of review that can be said to be apparent from its review application. That cannot be allowed.

[31] As I have already said, I would dismiss the appellant's appeal on the ground that the case that it now seeks to argue is not one that was foreshadowed in its review application and it is not permissible for it to do so and, as it no longer pursues the case contained in its founding affidavit, the application falls to be dismissed.

[32] There is another point about the case which the appellant now seeks to argue. The appellant says that the commissioner should not have acted in terms of sec 140(1) of the Act because it had an absolute right to legal representation. But the appellant did not say to the commissioner on the day of the arbitration: As employer I

have an absolute right to legal representation and that is why I have brought an attorney with me and I insist on exercising my right! On the contrary, the appellant moved an application before the commissioner based on sec 140(1) of the Act and asked the commissioner to exercise his power in terms of 140(1) of the Act in favour of the appellant and allow the appellant to be represented by an attorney. Accordingly, it is the appellant itself which asked the commissioner to deal with the matter on the basis of sec 140(1) of the Act. That being the case, how can the appellant now turn around and say that the commissioner committed a reviewable irregularity by dealing with the matter in terms sec 140 of the Act when it itself asked the commissioner to do so? In my view the appellant cannot do so. Such conduct on the part of the commissioner cannot, in those circumstances, constitute a gross irregularity. On this ground alone I would also dismiss the appellant's appeal.

[33] Furthermore, in contending that the commissioner should have declined to give effect to the provisions of sec 140(1), the appellant is in effect contending that the commissioner should have defied a statutory provision that told him what to do whenever a party wished to have legal representation. Sec 140(1) governed that situation and informed the commissioner when he could grant a party leave to be legally represented and when he could or should refuse. The appellant wished to be legally represented. Once the commissioner became aware that the appellant wished to be granted leave to be represented by an attorney, he had no choice but to apply the provisions of sec 140. Complying with the statutory provisions in sec 140(1) could not constitute a gross

irregularity on the part of the commissioner. Instead what could and would have constituted a gross irregularity on the part of the commissioner would have been his conduct if he had done exactly what the appellant now says he should have done, namely, ignore sec 140(1) of the Act and deal with the matter as if sec 140(1) was not there and did not govern the position.

[34] Accordingly, on this ground as well I would dismiss the appellant's appeal. However, assuming that the appellant is entitled to argue the case that it seeks to argue on appeal, I shall deal with it.

[35] The appellant advanced two further contentions in support of its appeal against the order of the Labour Court. It referred to the first contention as the broad argument and to the second one as the narrow argument. I deal hereunder with each in turn.

[36] Under the broad attack on sec 140(1) of the Act the appellant contends that sec 1(c), 9, 23(1), 33(1) and 34 of the Constitution confer an absolute right of legal representation in unfair dismissal proceedings before the CCMA. It argues that that absolute right flows from the fact that the CCMA:

(a) is a public and not a domestic tribunal;

(b) is required to determine a case in which one private person seeks to vindicate the rights conferred on him/her by statute in proceedings which are in the nature of a civil suit brought against another person;

(c) considers facts and circumstances placed before it and has to determine disputes by the application of law and/or a discretionary power conferred by law.

(d) performs its functions in circumstances in which the proceedings are potentially complex in nature and grave in consequence.

[37] It is necessary to have regard to those provisions of the Constitution which the appellant contends confer an absolute right to legal representation on a party in arbitration proceedings concerning unfair dismissal disputes relating to conduct or capacity before the CCMA. The first is sec 1(c).

Sec 1(c) reads:

> **"The Republic of South Africa is one, sovereign, democratic state founded on the following values:**
>
> **(c) the Supremacy of the Constitution and the rule of law"**

The next one is sec 9. I shall deal with sec 9 last. The next one is sec 23(1). Sec 23(1) reads:

> **"Everyone has the right to fair labour practices."**

Then there is sec 33(1). Sec 33(1) reads:

> **"(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."**

[38] With regard to sec 1(c) I shall assume that it is competent for this Court to assess the constitutionality of sec 140 of the Act against provisions of the Constitution that fall outside the Bill of Rights. On that assumption I have no hesitation in saying that there is nothing in sec 1(c) which confers the general or absolute right to legal representation in arbitration proceedings before the CCMA relating to disputes about dismissals for misconduct. The appellant's contention is completely devoid of merit. The same

conclusion applies to the contention based on sec 23(1), 33 and 34 of the Constitution. With regard to sec 23(1) it must be remembered that the Act is the legislation that was enacted to give effect to, inter alia, the right to fair labour practices provided for in sec 23(1) of the Constitution. With regard to sec 23(1) no reference is made to a right to legal representation. In any event, although the Constitutional Court has held in **Sidumo and another v Rustenburg Platinum Mines Ltd and others CCT 85/06** that arbitration proceedings conducted by the CCMA in respect of dismissals for misconduct constitute administrative action, it has held that the provisions of the Promotion of Administrative Justice Act – which is the legislation that was enacted to give effect to the right to just administrative action provided for in sec 33(1) of the Constitution – does not apply to arbitration proceedings conducted in terms of the Act by the CCMA in respect of dismissal disputes.

[39] Sec 34 of the Constitution reads:

> **"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".**

Sec 34 makes no mention of a general or absolute right to legal representation. The only conceivable basis upon which it could be argued that sec 34 provides for such a right would be to say that there can be no fair public hearing such as is contemplated by sec 34 without legal representation for a party that wants legal representation in a public hearing. Quite obviously there would be no merit in such argument because sec 34 does not have the effect that since February 1997 – when the Constitution came into

operation – every party to a dispute that is the subject matter of a public hearing by a tribunal or other forum which is not court of law where it resolves disputes by the application of law has a right to legal representation. In my view that is not only not the law but also it is not desirable that it should be the law. Once again the appellant's reliance upon sec 34 of the Constitution in support of its contention is, in my view, fundamentally flawed.

[40] The appellant's broad attack has as its point of departure the submission that at common law a party to proceedings before an administrative body such as the CCMA has a right to legal representation albeit not in every case. Mr Wallis has submitted that this premise of the appellant's case is fundamentally flawed because that is not a correct statement of the legal position. I agree with Mr Wallis. The position at common law is and, as far as I am aware, has been for ages, that before such bodies there is no general right to legal representation but that in certain circumstances a party may be entitled to legal representation, for example, if the matter involves complex legal issues. What the appellant has sought to do in stating the legal position as it has done is to take the exception and make it the norm and take the norm and make it the exception. That is putting the principle upside down. At common law there is no general or absolute right to legal representation in proceedings before administrative bodies. The rejection of the appellant's proposition in this regard disposes of a large part of its argument because much of its various arguments were dependent upon the appellant's proposition in this regard being correct.

[41] Section 9 of the Constitution also does not provide for any right to legal representation, let alone an absolute right to legal representation. Sec 9(1) of the Constitution reads:

> **"Everyone is equal before the law and has the right to equal protection and benefit of the law."**

[42] The appellant's so-called narrow argument also relies partly on sec 9 of the Constitution. The appellant submitted that sec 140(1) of the Act conflicts with sec 1(c) and sec 9 of the Constitution in that it is arbitrary in its effect and unequal in its operation. Conflating that part of the narrow argument that is based on arbitrariness and the part based on inequality, the appellant submitted that unequal treatment is normally justifiable if it is rationally connected to a legitimate government purpose. Counsel for the appellant pointed out that by parity of reasoning, unreasonable legislation generally produces no actionable complaint where it is rationally connected to a legitimate government purpose. Ultimately, Counsel for the appellant pointed out in their heads of argument that the attack under the broad heading recognises that the regime created by section 140(1) will be defended on the grounds that the regime is a justifiable limitation of the right to legal representation. He pointed out that the "**attack on the narrow ground takes those justifications and responds to them by point[ing] out that, even if they have substance in principle, the section fails properly to give effect to them.**"

[43] A careful consideration of the appellant's argument actually reveals that, once it is accepted that neither the common law nor the Constitution provides for an absolute or general right to legal

representation in proceedings before administrative bodies, there is nothing actually left of the appellant's appeal and it becomes unnecessary to discuss many of the arguments advanced because they were all based upon the premise that there is such a general or absolute right. There is no point in discussing any limitation to that right because there is no right to limit in the first place. If there is an argument to consider, it may be one that says the Act provides for a right to legal representation in regard to many arbitrations that it provides for but excludes that right in respect of arbitrations concerning disputes about dismissals for misconduct and such exclusion is irrational or arbitrary.

[44] To the extent that the Act provides for legal representation in certain arbitrations but does not treat arbitration proceedings relating to dismissals for misconduct equally or in the same way, there is justification for such limitation. Those cases in which the Act may be providing for a right to legal representation are different from cases of dismissal for misconduct. Anyone who has had anything to do with our labour law and the dispute resolution system in the labour field will know that by far the majority of cases that affect employers and employees and that "consume" public resources are dismissal cases and most of the dismissal cases are those relating to dismissal for misconduct. The legitimate government purpose in relation to the provision of compulsory arbitration under the Act was to provide a speedy, cheap and informal dispute resolution system. If you failed to achieve that goal in regard to disputes concerning dismissals for misconduct, you would never achieve that goal in respect of the entire Act.

[45] If one has a look at all the cases in which the Act provides for a right to legal representation, one will note a common denominator to the cases. That is that all of these cases occur very seldom. Indeed, they are few and far between. Furthermore the issues that arise in most of them can be quite technical, for example, demarcations, essential services and others.

[46] If provision was to be made for an absolute or general right to legal representation in respect of such disputes, that would make a serious contribution towards taking our new dispute resolution system in the 1995 Act back to the pre-1994 dispute resolution system under the Labour Relations Act, 1956 which had become totally untenable by the time the 1995 Act was passed. That cannot be done.

[47] In conclusion I find that the appellant's contention that there is a general or absolute right to legal representation before the CCMA in arbitration proceedings concerning disputes about dismissals for misconduct or incapacity falls to be rejected because there is no such right. However, even if there was such a general right to legal representation in arbitration proceedings before the CCMA, I would be satisfied that the exclusion thereof or its limitation in those arbitration proceedings that relate to dismissals for misconduct was fully justifiable and justified. Accordingly, the appeal must fail. As the appeal was unopposed, the issue of costs does not arise.

[48] In the premises the appeal is dismissed.

ZONDO JP

I agree.

JAPPIE JA

Appearances:

For the appellant	:	Mr M.S.M Brassy SC
Instructed by	:	Bowman Gilfillan Inc
For the respondents	:	No appearance
At the request of the Court as Amici	:	Mr M.J.D Wallis SC (with Mr P.J Wallis).
Date of judgment	:	5 December 2008

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Case No.: JA1/2005

In the case between:

NETHERBURN ENGINEERING CC t/a NETHERBURN CERAMICS Applicant

and

R MUDAU AND TWO OTHERS Respondent

JUDGMENT

H.M. MUSI, J.A.

INTRODUCTION

[1] This appeal concerns the constitutionality of section 140(1) of the Labour Relations Act no. 66 of 1995 ("the LRA") which restricts the right to legal representation in arbitration proceedings conducted under the auspices of the Commission of Conciliation, Mediation and Arbitration ("the CCMA") concerning unfair dismissals based on misconduct and incapacity. It is an appeal against a judgment of Landman J delivered in the Labour Court on 31 August 2003. The appeal is before this Court with leave for the court *a quo*. The judgment of the court *a quo* is reported as Netherburn Engineering CC t/a Netherburn Ceramics v R Mudau and Others (2003) 24 ILJ 1712 (LC).

[2] The matter arises from the dismissal by the appellant of Miss Jane Moabelo, the third respondent, from its employ on account of alleged misconduct. Conciliation having failed, the dispute was arbitrated by the first respondent under the auspices of the CCMA, the second respondent. When the parties initially reported for the arbitration hearing, the appellant was represented by an attorney. The arbitrator, acting in terms of section 140(1) of the LRA, refused to allow legal representation, whereupon the appellant requested a postponement as the director representing it had not been prepared to conduct its case on his own. The application was refused, whereupon the director walked out together with his attorney and the hearing continued in the appellant's absence. The arbitrator ruled that the third respondent's dismissal had been unfair and ordered the appellant to pay her compensation.

[3] The matter was taken on review to the Labour Court. The latter Court set aside the arbitration award on the basis that the arbitrator had misdirected himself in refusing to grant the applicant a postponement and proceeding with the hearing in

its absence. It referred the matter to the CCMA for a hearing *de novo*.

[4] The appellant had argued as part of the review grounds that it was entitled to legal representation as of right and that insofar as section 140(1) purported to subject the exercise of such right to discretion by a commissioner of the CCMA, it was in conflict with the Constitution. It thus sought an order directing the CCMA to allow it legal representation at the new hearing. The court *a quo* ruled against the appellant on this point and declined to grant the additional order sought. It is against the latter decision that the appellant now appeals.

[5] I should point out at once that this constitutional challenge was not foreshadowed in the appellant's founding affidavit in its review application. It would seem to have been raised for the first time in argument before the court *a quo*. But then the court *a quo* allowed it to be argued and ultimately decided it. Leave to appeal to this court was granted precisely because the court *a quo* was of the view that

another court could come to a different conclusion on the same issue. In my view, it would, in the circumstances, be in the interest of justice that we deal with the issue notwithstanding the fact that it was not part of the applicant's review application.

[6] I should mention at this junction that the Ministers of Labour and of Justice and Constitutional Development were notified of the constitutional challenge in the court *a quo* but neither Minister deemed it necessary to intervene in the proceedings. When the matter came to this court, the Minister of Labour was again notified but again declined to intervene. On the other hand, the respondents did not oppose the appeal in this Court, so that it was heard as an unopposed matter. However, having heard counsel for the appellant we felt that we needed the benefit of another view on the matter and advocate M. J. D. Wallis SC was invited to act as *amicus curiae* and to submit written submissions. He obliged and submitted full heads of argument with the assistance of Adv. P. J. Wallis. Counsel for the appellant

then filed further heads of argument in response to the points raised by the *amici curiae*.

JURISDICTION

[6] The appeal was initially argued on the basis that this Court has jurisdiction to pronounce on the constitutionality of the statutory provision under attack and to strike the provision down if it was found to be unconstitutional. However, the *amici curiae* have suggested that the matter is not that straightforward. They argued that this Court's jurisdiction is limited to striking down only those statutory provisions which are in violation of the rights enshrined in chapter 2 of the Constitution. The reason for this proposition is that since the Labour Court and this Court are creatures of statute, they have jurisdiction only in respect of those matters that have been assigned to them by statute. It was argued that whereas section 172(2) of the Constitution grants the Labour Court, as a court of similar status with the High Court, the power to pronounce on the validity of an Act of parliament, this power relates only to matters that have been specifically assigned to the Labour Court. Counsel referred to section

157(2) of the LRA which provides that the Labour Court has concurrent jurisdiction with the High Court on alleged or threatened violations of any fundamental right contained in chapter 2 of the Constitution arising *inter alia* from employment relations and the administration of the laws which fall under the responsibility of the Minister of Labour and submitted that this jurisdiction is confined to considering the validity of statutory provisions impinging on the rights contained in chapter 2. In the result, so it was contended, the Labour Court, and consequently this Court, have no jurisdiction in respect of violations of the rights falling outside chapter 2, like the legality provisions contained section 1 of the Constitution.

[7] In response, counsel for the appellant made a somewhat puzzling submission. He said that the *amici* have missed the point, that the appellant does not seek to have the impugned provision struck down. It is apposite to quote from the additional heads of argument.

"5.1 What Netherburn submits is that the first respondent ("the Commissioner"), in basing his decision rejecting the application for legal representation on s 140(1) brought into account a legal provision that is constitutionally invalid and so committed a reviewable irregularity.

5.2 CCMA commissioners have no power to make an order declaring a statutory provision to be unconstitutional, for they do not enjoy the status of a superior court. They do, however, have the power to decline to enforce the provisions of a statute that violate the Bill of Rights and this is so whatever the nature of the statue."

Counsel goes on to state the following:

"5.4 It follows that, in these proceedings, it is a matter of no consequence whether, in the face of a violation of the Bill of Rights, the court has a power to strike down the offending section or not. The true question is whether a court or tribunal has jurisdiction to decline to enforce a statutory provision that it considers to constitute such a violation. Every adjudicative body, whatever its nature, has such jurisdiction."

[8] I say that this submission is puzzling because the essence of the appellant's case has always been that section 140(1) is unconstitutional and that it should be struck down. In fact counsel adopted this stance throughout the course of his oral argument. He made it clear that he considered section 140(1) to be...

> "totally inconsistent and incoherent that it has to be struck down on the ground of irrationality".

The point, however, is that even if we were to approach this appeal on the narrow basis that the commissioner committed an irregularity in the sense that he based his decision on an invalid statutory provision, we will still have to rule on the question of whether the provision is indeed unconstitutional and therefore invalid.

[9] In my view, the Labour Court does have jurisdiction to decide on the validity of the impugned provision where it allegedly violates any of the rights enshrined in the Constitution and not only those contained in chapter 2. Section 157(1) of the LRA provides:

> "Subject to the Constitution and section 173, and except where *this Act* provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of *this Act* or in terms of any other law are to be determined by the Labour Court."

What this means is that the LRA is not the only source of the powers of the Labour Court but that other laws may confer jurisdiction on it. One such law is the Constitution which, in terms of section 172(2), gives the Labour Court the power to enquire into and make orders concerning the constitutional validity of an Act of Parliament.

[10] But of course this does not mean that the Labour Court can pronounce itself on the constitutional validity of any statutory provision. Its powers are confined to constitutional disputes arising from employment and labour relations. See **CHIRWA v TRANSNET LTD AND OTHERS** 2008 (3) BCLR 251 (CC) at 286 par. 115. Quite clearly the constitutionality of the impugned provision falls within the jurisdiction of the Labour Court and this Court. Regarding the submission that such jurisdiction is confined to threatened violations of the

fundamental rights enshrined in chapter 2 of the Constitution and not the rights embodied in section 1 of the Constitution, it has been laid down by the Constitutional Court that the values embodied in section 1 of the Constitution do not give rise to enforceable rights but are rather guiding principles that inform the application and interpretation of all other provisions of the Constitution. See **CHIRWA v TRANSNET**, *supra* at paragraphs 74 and 75.

THE IMPUGNED PROVISION

[11] It is important to reproduce section 140(1) of the LRA. As it is closely linked to section 138(4) it becomes necessary to reproduce the latter section as well. I quote these sections in the order in which they appear in the Act. Section 138(4) provides as follows:

> "In any arbitration proceedings, a party to the dispute may appear in person or be represented only by:
>
> (a) a legal practitioner;
>
> (b) a director or employee of the party; or
>
> (c) any member, office-bearer or official of that party's registered trade union or a registered employer's organisation."

Section 140(1) provides as follows:

> "If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties, despite section 138(4), are not entitled to be represented by a legal practitioner in the proceedings unless-
>
> (a) the commissioner and all the other parties consent;
>
> (b) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering-
>
> (i) the nature of the questions of law raised by the dispute;
>
> (ii) the complexity of the dispute;
>
> (iii) the public interest; and
>
> (iv) the comparative ability of the opposing parties or their representatives to deal with the dispute."

The first ground of attack

[12] The first of the several grounds upon which the constitutionality of section 140(1) of the LRA is attacked, is that it infringes the rule of law encompassing the legality principle enshrined in section 1(c) of the Constitution as well

as certain rights contained in chapter 2 of the Constitution, namely the right to equality (section 9), the right to fair labour practices (section 23(1)), the right to administrative action that is lawful, reasonable and procedurally fair (section 33(1)) and the right to have access to courts and other tribunals (section 34). In oral argument, counsel for the appellant referred to this ground as the rights or broad argument. It is dubbed a "rights argument" because it implicates the infringement of rights and is based on the constitutional principle that one of the constraints of the exercise of legislative power is that it must not infringe on the rights contained in the Bill of Rights. See **NEW NATIONAL PARTY OF SOUTH AFRICA v GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS** 1999 (3) SA 191 (CC) par. 20; **AFFORDABLE MEDICINES TRUST AND OTHERS v MINISTER OF HEALTH OF THE RSA AND ANOTHER** 2005 (6) BCLR 529 (CC) par. 76. The argument proceeds from the premise that these provisions, either individually or collectively, provide for a right to legal representation in unfair dismissal proceedings before the CCMA. Of course none of these provisions contain any mention of legal representation, so that the argument boils

down to saying that such right must necessarily be inferred.

In my view, this ground of attack can best be considered with reference firstly to the common law position regarding legal representation in proceedings before statutory bodies and other tribunals.

The common law position

[13] At common law the basic requirement for the conduct of proceedings before statutory bodies and domestic tribunals is that there must be conformity with the principles of natural justice to ensure procedural fairness. The issue of legal representation is regulated by whatever statute, regulation or rule that may be applicable, which may allow or preclude it. Where it is neither allowed nor prohibited, the tribunal has a discretion to allow it in appropriate circumstances. In short, there is no absolute right to legal representation. See **DABNER v SOUTH AFRICAN RAILWAYS AND HARBOURS** 1920 AD 583 at 598; **DLADLA AND OTHERS v ADMINISTRATOR, NATAL, AND OTHERS** 1995 (3) SA 769 (NPD).

[14] The matter of **HAMATA AND ANOTHER v CHAIRPERSON, PENINSULA TECHNIKON INTERNAL DISCIPLINARY COMMITTEE, AND OTHERS** 2002 (5) SA 449 (SCA) is of particular significance because it was decided after the advent of constitutionalism in South Africa. There the Supreme Court of Appeal reaffirmed that at common law there is no "entitlement as of right to legal representation" in proceedings before statutory bodies and other tribunals and that the Constitution has not abrogated the common law position. The court expressed itself as follows at p. 458 C:

> "In short there is no constitutional imperative regarding legal representation in administrative proceedings discernable, other than flexibility to allow for legal representation but, even then, only in cases where it is truly required in order to obtain procedural fairness."

But then the court made an important qualification to the common law. It said that under the Constitution it is imperative to allow for flexibility so that tribunals are vested with a discretion to permit legal representation in appropriate circumstances where legal representation is necessary in order to ensure procedural fairness and that a rule that

prohibits the exercise of a discretion cannot pass muster under the Constitution. In this way the court brought the common law in line with the underlying values for the Constitution. The decision in **HAMATA** was followed in **MEC: DEPARTMENT OF FINANCE, ECONOMIC AFFAIRS & TOURISM, NORTHERN PROVINCE v MAHUMANI** (2005) 2 ALL SA 479 (SCA).

The position under PAJA

[15] The enactment of the Promotion of Administrative Justice Act no. 302 of 2000 (PAJA) sheds light on the issues under consideration. This Act was passed specifically in order to give effect to section 33 (1) of the Constitution providing for the right to administrative action that is lawful, reasonable and procedurally fair. The only section in this enactment that bears on legal representation is section 3(2)(a) and it is significant that it confers no right to legal representation in proceedings before administrative tribunals but rather confers a discretion on an administrator to give "an opportunity to obtain assistance and, in serious or complex cases, legal representation". This is, in my view, a restatement of the common law as subsumed in the

Constitution and I can find no fundamental difference between it and the impugned provision. In enacting PAJA, Parliament was implementing a constitutional mandate and would have had the values of the Constitution in mind. As was stated in **HAMATA** (at 457) there was what can only be construed "a deliberate omission to award or recognise" a general right to legal representation and that "section 3(2)(a) recognises and reaffirms what had long been axiomatic in the common law, namely, that a fair administrative procedure depends on the circumstances of each case".

[16] The *amici curiae* referred to the case of **RUSTENBURG PLATINUM MINES LTD (RUSTENBURG SECTION) v THE COMMISSIONER OF CONSILIATION, MEDIATION AND ARBITRATION AND OTHERS** (2006) 27 ILJ 2076 (SCA) which was decided after the judgment of the court *a quo* and whilst this appeal was pending. It was there held that the arbitral decisions of the commissioners of the CCMA constitute administrative action as defined in PAJA and that the latter Act overrides the LRA. The court laid down that commissioners of the CCMA should be guided by the provisions of PAJA in the conduct of arbitration proceedings.

Although this case dealt with the provisions of section 145(1) of the LRA, its decision is equally applicable to all the provisions of the LRA relating to conduct of arbitration proceedings before the CCMA. The effect of this judgment is that section 3(2)(a) of PAJA would take precedence over the provisions of both section 138(4) and section 140(1) of the LRA, which would mean that legal representation in all CCMA arbitration proceedings would be subject to the discretion of the presiding commissioner. The *amici curiae* submitted on this basis that the appellant should have directed its constitutional challenge to section 3(2)(a) of PAJA. This is tantamount to saying that the present appeal is futile.

[17] The decision in **RUSTENBURG PLATINUM MINES**, *supra* has since been overruled by the Constitutional Court in **SIDUMO AND ANOTHER v RUSTENBURG PLATINUM MINES LTD AND OTHERS** 2008 (2) BCLR 158 (CC). Whilst agreeing that the awards of the CCMA constitute administrative action as defined in PAJA, the court nonetheless ruled that the provisions of PAJA cannot take precedence over those of the LRA in the adjudication of

employment and labour disputes and therefore that CCMA arbitrations must be conducted in terms of the provisions of the LRA. It is significant that even though the issue of legal representation in proceedings before the CCMA did not pertinently arise in **SIDUMO**, passages in the majority judgment reveal that the Constitutional Court was aware of the provisions of the LRA that limit the rights to legal representation in such proceedings. In distinguishing between the CCMA as an administrative tribunal and a court of law, the court had this to say at p. 184, par. 85:

> "The CCMA is not a court of law. A commissioner is empowered in terms of section 138(1) to conduct the arbitration in a manner that he or she considers appropriate in order to determine the dispute fairly and quickly but with the minimum of legal formalities. There is no blanket right to legal representation."

And at p. 191, par. 118 the court acknowledges that employees are usually not represented and this is linked to the informal nature of the proceedings and the need for a speedy resolution of labour disputes.

[18] It is not without significance that **SIDUMO** endorsed what was stated in **BATO STAR FISHING (PTY) LTD v MINISTER OF ENVIRONMENTAL AFFAIRS AND OTHERS** 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) par. 25 to the effect that PAJA is a codification of the common law grounds of review, so that administrative review now proceeds under PAJA. In stating this, the Constitutional Court, like the SCA in **HAMATA**, *supra* and **RUSTENBURG PLATINUM MINES**, *supra*, was aware of the common law, now subsumed in PAJA, which vests administrative tribunals with a discretion in matters of legal representation. And PAJA is sourced directly from the Constitution.

Distinguishing the CCMA from other tribunals

[19] The appellant was clearly aware of the common law position and, in particular, it did not challenge the authority of the **HAMATA** judgment. For that reason the appellant made it clear that it did not argue that the Constitution provides for an absolute right of legal representation in all proceedings before administrative tribunals. The appellant sought a way out by drawing a distinction between dismissal proceedings before the CCMA and proceedings before other tribunals. It

was contended that in regard to unfair dismissal dispute proceedings before the CCMA sections 1(c), 9, 23(1), 33(1) and 34 of the Constitution provide for an absolute right to legal representation whereas this is not the case with proceedings before other tribunals. The basis of this distinction is the allegedly peculiar nature of the function performed by the CCMA when arbitrating unfair dismissal disputes. The features or considerations that are said to make the CCMA different from the other tribunals are the following:

- that the CCMA is a public tribunal which is required to determine conflicting claims by private persons or entities based on the rights conferred by statutes;
- that it determines the issues by a consideration of the facts put before it and the application of the law to the facts;
- that the issues are potentially complex and the consequences always grave for the parties and that such proceedings are in the nature of a civil dispute in a court of law.

[20] The first difficulty I have with this proposition is that there is no basis either in the common law or under the Constitution

for distinguishing between the CCMA and other statutory tribunals. They all perform similar functions and the same principles underlie the manner in which they operate. Although each of the various public tribunals deals with a different subject matter, in all cases the disputes range from the simple to the complex, the potential for complexity is always lurking and the consequences for the parties may be grave. The considerations referred to above are present in varying degrees in all disputes involved in proceedings before other statutory tribunals and are not peculiar to the CCMA. No wonder when the presiding judge asked the appellant's counsel what would distinguish the function of the CCMA from, say, that of the Liquor Licensing Board, counsel could not give a direct answer. He instead shifted the focus away from inferring an automatic right to legal representation in the Constitution to locating such a right in the provisions of the LRA.

[21] The other problem is that the proposition presupposes that the nature of the function of the CCMA is peculiar in respect of proceedings involving unfair dismissals and not so when it arbitrates other types of dispute. In other words, the CCMA,

like a chameleon, changes colours, becoming green when it arbitrates dismissal disputes and yellow when it arbitrates other types of dispute. And why would the Constitution confer an entitlement to legal representation as of right in respect of unfair dismissal proceedings and withhold it in respect of other proceedings? In my view, the distinction sought to be drawn between the CCMA when arbitrating unfair dismissal disputes, on the one hand, and when arbitrating other types of dispute and other tribunals, on the other, is artificial. The attack under the broad argument stands to fail.

The rationality challenge

[22] The main thrust of the appellant's case was that section 140(1) is irrational. As counsel for the appellant put it, all the appellant's grounds of attack converge in a rationality challenge. This challenge is mounted under two further grounds. In oral argument counsel for the appellant referred to these as the "implicated" argument and the equality argument. They are two sides of the same coin, for as counsel conceded, the same rationality test is valid for both grounds. Before dealing with these grounds I should

mention that the *amici curiae* correctly pointed out that rationality as a constitutional principle derives from the rule of law provision of section 1(c) of the Constitution, which encompasses the principle of legality. However, the *amici* submitted that this court cannot entertain the challenges based on this provision on the basis of their earlier submission that the jurisdiction of the Labour Court (and this court) is confined to a consideration of the challenges implicating the rights contained in the Bill of Rights provision of the Constitution.

[23] I have already indicated that this submission cannot be correct. It emanates from the wrong proposition made by the appellant to the effect that the right to legal representation can be sourced from section 1 of the Constitution. As pointed out in par. [10] above, section 1 does not confer enforceable rights. Moreover rationality is one of the yardsticks or standards by which the constitutionality of all statutory enactments, and indeed the exercise of all public power by the executive and other functionaries, is tested. This test of rationality has been stated in various constitutional court judgments as entailing that there must be

a rational connection between the challenged statutory provision and the achievement of a legitimate government purpose. Absent such connection and the provision is irrational and unconstitutional. See **NEW NATIONAL PARTY OF SOUTH AFRICA v GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS**, *supra* par. 19; **PHARMACEUTICAL MANUFACTURERS OF SA: IN RE EX PARTE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** 2000 (2) SA 674 (CC) par. 85; **AFFORDABLE MEDICINES TRUST AND OTHERS v MINISTER OF HEALTH OF THE RSA AND ANOTHER** *supra* at par. 74.

[24] Under the implicated argument the appellant engaged in an analysis of the impugned provision in relation to section 138(4) and other provisions of the LRA, and sought to show that the provision is irrational. Central to this argument are two propositions. The first is that section 138(4) is an overarching provision that confers a general right of legal representation in arbitration proceedings under the auspices of the CCMA and that section 140(1) is an exception that restricts such right. The second proposition is that the

restriction on legal representation embodied in the impugned provision applies only to practicing lawyers.

Are only practicing lawyers excluded?

[25] The proposition that only practicing lawyers are excluded permeates all the facets of debate under the present heading and is the common denominator in almost all of the instances cited for the alleged irrationality of the provision. The basis of the proposition is that the employer-companies can take into their employ persons admitted to practise as advocates or attorneys and that these can then represent them in CCMA arbitrations. Likewise trade unions can take into their employ admitted advocates or attorneys who can then represent them. Furthermore it is contended that academic lawyers and other legally qualified people are not excluded, so that whereas section 140(1) purports to prohibit legal representation, in practice it fails to achieve this purpose and therein lies the irrationality, so the argument goes.

[26] The problem with this proposition is that it misconstrues the definition of legal practitioner. Section 213 of the LRA

defines legal practitioner as “any person admitted to practise as an advocate or an attorney in the Republic”. This means that as long as a person is admitted either as an advocate or attorney, whether he/she is in private practice or not, he/she is excluded from representing parties in proceedings contemplated in section 140(1). It stands to reason that an admitted advocate or attorney employed by a company or a union cannot appear in such proceedings in the disguise of a company executive or union representative. The same would be the case with a university professor or lecturer. As long as he/she is admitted as an advocate or attorney, he/she is excluded. That leaves only persons who are legally qualified but are not admitted as either advocate or attorney. It can be accepted that there would be very few people countrywide sitting with either a B.Proc or LL.B who would not have been admitted as either an attorney or advocate. This is so because those who study the law have as their ultimate objective to qualify as either attorney or advocate and even those who do not practise want the designation because of the esteem that goes with it. That is why university lecturers generally get themselves admitted as either attorney or advocate and people with LL.B. degrees

employed in government departments and private institutions generally prefer to be admitted as advocates precisely because of the esteem that goes with that designation. The fact that a negligible number of pseudo lawyers can represent parties via the backdoor cannot justify the conclusion that the provision fails to achieve its purpose and is irrational. In this regard there is nothing stopping the CCMA from verifying in each case whether a representative is an admitted attorney or advocate.

[27] The contention that the impugned section fails to achieve its purpose because it excludes only practicing lawyers features prominently in another contention made on behalf of the appellant, namely, that it is impossible to identify what is the legitimate government purpose that the section is meant to serve. In this regard the appellant identified four possible reasons why legal representation is excluded. Firstly, the need to ensure that there is equality in the capacity of the employers and employees to conduct their respective cases or, to adopt the phraseology of counsel for the appellant, to ensure parity of arms. Secondly, to curtail legalism and keep the proceedings informal. Thirdly, to minimise delays

occasioned by the need to accommodate the schedules of lawyers. Fourthly, the notion that individual unfair dismissals are generally unimportant or simple, to again adopt the phraseology employed by counsel for the appellant.

[28] The thrust of the appellant's argument in this regard is that the whole purpose of achieving parity of arms, minimising delays and making the proceedings informal, is defeated because non-practising lawyers can appear. This, it was argued, rendered the impugned provision irrational. Much emphasis was placed on the consequences of unfair dismissals. The appellant's counsel said that when a person's livelihood or the legality of an employee's dismissal is at stake, it is a grave matter and submitted that every dismissal dispute holds grave consequences for the parties. Counsel echoed the sentiments attributed to Lord Denning in **PETT v GREYHOUND RACING ASSOCIATION LTD** (1969) 1 QB 125 (CA) 1998 (2) ALL ER 545, to the effect that the fact that a man's livelihood is at stake, is a grave matter. It was submitted that rather than subjecting the grant of legal representation to a discretion, logic demands that there should in fact be representation as of right. It was further

contended that it is absurd to expect a commissioner of the CCMA to properly determine beforehand whether the matter is complex or not in order to be able to exercise his/her discretion either way and that the matter is compounded by the fact that once a discretion is exercised against the grant of legal representation, it cannot be reversed if it should later become apparent that the matter is in fact complex.

[29] In my view, the answer to the contentions around the gravity and complexity of individual unfair dismissal disputes, has been provided by the *amici curiae*. The issue is not the gravity of the consequences of the dismissal but rather the complexity thereof. This is so because dismissal will always entail adverse consequences for the employee, in particular. It is the nature and complexity of the issues, both of fact and of law involved, whether the issues implicate the public interest and the comparative ability of the parties or their representatives to adequately deal with the issues that inform the decision whether to permit legal representation. A commissioner will always be able to determine these by making proper enquiries ahead of the hearing and he/she does not need powers of divination to do this. Nor is there

merit in the suggestion that only the parties can determine complexity. Besides, if there is unanimity amongst the parties that the issues are complex, they can consent to legal representation. And there are ample remedies available to the party who feels that the refusal to permit legal representation has resulted in an unfair process. In addition, a party who is convinced that the issues are complex and genuinely fears that the commissioner may not appreciate this, can have recourse to the provisions of section 191(6) of the LRA.

Contrasting section 138(4) and section 140(1)

[30] I now turn to consider the proposition that section 138(4) provides for an automatic right of legal representation and that section 140(1) is an exception to it that limits such right. The matter can best be approached by first determining what is the purpose that the impugned provision is meant to serve. In this regard, the court *a quo* referred to the Explanatory Memorandum on the Labour Relations Bill as published in (1995) 16 ILJ 70 (the Memorandum). The Memorandum takes into account the experience drawn from the application of the 1956 LRA and points out that under the latter Act

resolution of labour disputes had, contrary to earlier intentions, become legalistic in form with the result that the process had become expensive, inaccessible, protracted and adversarial. The Memo attributes this to the involvement of lawyers and recommends that the best way of correcting the situation is to exclude them from the process. Now it made be argued that it was unreasonable to blame lawyers and to exclude them from the process, but it is not for this court to decide on issues of reasonableness under the present argument. See **NEW NATIONAL PARTY OF SOUTH AFRICA v GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS**, *supra* at p. 206 C – F.

[31] In my view, the impugned provision is rationally connected to the purpose of achieving speedy, cheap, accessible and informal resolution of labour disputes. Section 138(1) makes it clear that the expeditious resolution of the dispute must also ensure that its substantial merits are dealt with and as long as this is done, the effectiveness of the process is ensured as well. It is noteworthy, as the *amici curiae* have pointed out, that in spite of pleas to the contrary, Parliament proceeded to implement the proposals contained in the

Memorandum. It can therefore not be said that Parliament was not aware of the sort of criticism raised in this appeal.

[32] It is against this background encompassing the rationale behind the exclusion of legal representation that sections 138(4) and 140(1) should be read. Subsection 1 of section 138 bears some significance and it is appropriate to reproduce it. It reads:

> "1. The commissioner may conduct arbitration in the manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly but must deal with the substantial merits of the dispute with the minimum of legal formalities."

This echoes the theme of the Memorandum. Section 140(1) concretises such theme and, viewed in its proper prospective, it is a substantive provision that gives effect to the overall purpose of ensuring speedy, cheap and informal resolution of disputes. This also means that the impugned provision is rationally connected to a legitimate government purpose and passes the test of rationality.

[33] Section 138, on the other hand, deals with matters of procedure and it is particularly significant that legal representation is located within this context of procedural provisions. This signifies that subsection 4, which is the only clause containing the notion of legal representation, is not a substantive provision. Within the context of the broader scheme of exclusion of legal representation in dismissal proceedings, subsection 4 of section 138 is an exception and should be read subject to the provisions of section 140(1). The nature of the clause can also be gleaned from the fact that legal representation as such is not mentioned. Rather the provision mentions a legal practitioner in the context of people who have *locus standi* to appear on behalf of parties in arbitration proceedings, like company executives and trade union officials.

[34] The contention that section 140(1) constitutes a qualification of the right conferred by section 138(4) arises from the order in which the two sections appear and the wording of section 140(1), especially the insertion of the phrase “despite section 138(4)”. In my view, this is a result of inept draftsmanship. A

purposive construction of the provisions leads to the conclusion I have reached in the preceding paragraph.

Is the differentiation arbitrary?

[35] The impugned provision was also attacked on the basis that it exhibits internal incoherencies and inconsistencies and discriminates against employees dismissed on account of misconduct and incapacity. However, no unfair discrimination was averred. The criticism relates to what has been referred to as mere differentiation. See **PRINSLOO v VAN DER LINDE AND ANOTHER** 1997 (3) SA 1012 (CC) para 24 and 25. The question in this regard is whether the differentiation is rationally connected to a legitimate government purpose and if this threshold is passed, then there will be no need to consider the two other steps listed in **HARKSEN v LANE NO AND OTHERS** 1998 (1) SA 300 (CC) par. 45, in order to complete the enquiry to determine whether a statutory provision offends the equality provision of the Constitution. Again, as counsel for the appellant said, the equality argument collapses in a rationality challenge.

[36] Now I have found that the impugned provision is rationally connected to a legitimate government purpose. But that is not the end of the matter, because it still has to be assessed whether the differentiation is arbitrary or, as the appellant averred, incoherent and inconsistent. See **PRINSLOO v VAN DER LINDE AND ANOTHER**, *supra* par. 25. Several instances of alleged incoherencies were raised. One was that the exclusion of legal representation in unfair dismissal proceedings is arbitrary, since it applies only to practicing lawyers, an issue that I have already dealt with. Another point raised relates to the discretion conferred on commissioners of the CCMA permitting them to allow legal representation in appropriate circumstances. It was contended that all dismissals hold grave consequences or, as counsel put it, gravity is a constant or non-variable in all dismissals. Therefore there should be no discretion at all. In providing for a discretion in some instances and not in others, the impugned provision is arbitrary, so it was argued. It was accepted that some dismissal disputes are more complex than the others, but it was contended that the conferment of a discretion does not help because a

commissioner has no power of divination enabling him or her to determine beforehand if a dispute is complex.

[37] I can find no reason why a commissioner should not be able to determine beforehand whether a matter is complex or not. He/she can do that by making proper enquiries from the parties as is indeed done in practice. He/she does not need to be a prophet to do that. As the *amici curiae* have pointed out, in the exercise of a discretion conferred by subsection (b) of the impugned provision, the issue is not the gravity of the matter but rather its complexity. Apart from complexity, the commissioner is required to take into account the nature of the questions of law raised by the dispute, the public interest and the comparative ability of the opposite parties or their representatives to deal with the dispute. These are all issues that the commissioner can determine by a proper enquiry. In this regard, the impugned provision is in fact an improvement on the common law since it provides guidance, whereas the common law does not. It attempts to ensure that where legal representation is needed in the interests of justice, it should be permitted.

Differentiating between categories of disputes subject to CCMA arbitration

[38] The further question is whether the impugned provision is arbitrary on the basis that it differentiates not only between dismissals and other types of dispute but also between dismissals on account of conduct and capacity, on the one hand, and other types of dismissals, on the other. This question arises from the fact that there are many disputes that are also subject to the arbitral jurisdiction of the CCMA in respect of which legal representation can be had as of right, and secondly, because there are some unfair dismissals in respect of which there is an automatic entitlement to legal representation. The first distinction is between two clearly different categories of dispute: dismissal disputes on the one hand, and other types of disputes, on the other. The latter category includes *inter alia* disputes concerning organisational rights, collective agreements, workplace *fora* and the disclosure of information.

[39] The first point to be made is that treating unfair dismissal disputes differently from disputes involving organisational rights and the like, is perfectly legitimate as it amounts to

applying different methods to resolving different categories of dispute. Secondly, I endorse the views expressed by the *amici curiae* regarding the disputes involving organisational rights, when they state that "an examination of the type of case under each head shows that the disputes are inherently more technical and legalistic and will most often require the consideration and interpretation of contracts and/or statutes". I think that it was only proper to make an exception in their case and allow legal representation.

[40] Experience in the application of the LRA teaches that dismissals on account of misconduct and incapacity are by far the majority of disputes that come before the CCMA for conciliation and arbitration and Parliament was clearly aware of this, based on the experiences under the old Labour Relations Act. The *amici curiae* have referred to the case statistics compiled by the CCMA which indicate that of all matters referred to it between 2004 and 2006 about 80% involve unfair dismissals. It makes sense therefore that the Legislature identified unfair dismissal disputes as the appropriate category where the policy considerations underlying the need to exclude legal representation should

find application. Moreover, it is in this category encompassing individual dismissals where the majority of the disputes are simple and straightforward.

[41] The final question is: Why exclude dismissals other than those on account of misconduct and incapacity from the exclusion of legal representation? I use these words deliberately because, in my view, the exclusion of legal representation was intended to be the norm rather than the exception. The answer again must be found in the fact that the dismissals based on conduct and capacity constitute by far the bulk of the disputes arbitrated by the CCMA.

[42] In argument reference was made to section 191(5) of the LRA and it was pointed out that constructive dismissal, dismissal where the employee does not know the reasons for the dismissal and unfair labour practice disputes are, alongside conduct and capacity dismissals, all subject to compulsory arbitration and yet legal representation is excluded in respect of conduct and capacity dismissals. It was contended that this differentiation is incoherent and arbitrary. In the first place, the latter cases are different from

dismissals for misconduct and incapacity. Secondly, misconduct and incapacity dismissals constitute by far the bulk of the work of the CCMA and the bargaining councils. If the exclusion of legal representation was meant to achieve the legitimate government purpose of providing for speedy, cheap and informal resolution of dispute, then it made sense to confine it to the majority of the cases.

[43] The figure of unfair labour practice is a different kettle of fish. On the face of it, it is a less serious matter than a dismissal on whatever basis. In practice, however, it is not an easy matter for an employee to take on his/her employer alleging unfair labour practice lest the challenge triggers dismissal. I would think that an employee would feel much comfortable if this could be done through the assistance of a lawyer who would be better placed to take the necessary precautions to protect the interest of the client. And the issues more often than not turn out to be complex. A perusal of the relevant case law will illustrate this.

CONCLUSION

[44] I come to the conclusion that the impugned provision is not in conflict with the Constitution. For that reason it is unnecessary to go into the issue of whether it is a justifiable limitation as set out in section 36 of the Constitution. Nor was this issue sufficiently canvassed in argument, counsel for the appellant having intimated that if we find against him on the rationality challenge that would be the end of the matter.

[45] I would dismiss the appeal and, since it was not opposed, there should be no order as to costs.

H.M. MUSI, J.A.

On behalf of appellant:	Adv. M.S.M. Brassey SC With him: Adv. P.A. Buirski Instructed by: Bowman Gilfillan Inc SANDTON
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