REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Case no: CA16/2012

In the matter between:

NUMSA obo JONGIKHAYA CHRIS SINUKO Appellant

and

POWERTECH TRANSFORMERS (DPM) First Respondent

DANIEL DU PLESSIS Second Respondent

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL ("*MEIBC*") Third Respondent

Coram: **WAGLAY JP; TLALETSI ADJP; COPPIN AJA**

Heard: **21 May 2013**

Delivered: **02 December 2013**

Summary: Jurisdiction- the nature of the dispute is determined from the facts of the case and not by the employee's characterisation thereof. While

jurisdiction is initially assumed on the basis of what the employee alleges the reason for the dismissal to be, if it subsequently becomes apparent that the reason is different and one in respect of which the arbitrator does not have jurisdiction, the arbitrator shall not determine the merits of the dispute, but allow the dispute to be referred to the forum with jurisdiction for determination. Caution must be exercised before concluding that the dispute is one in respect of which the arbitrator does not have jurisdiction. The true nature of a dispute may only become apparent after all the evidence is in.

The Labour Appeal Court's power to decide grounds of review not dealt with by the Labour Court- the power is similar to the power of the Supreme Court Of Appeal- is derived from s174 of the Labour Relations Act, No. 66 of 1995- and is to be exercised sparingly, with consent of the parties for convenience, or if there has been a delay and a referral back to the Labour Court will result in further inordinate delay in the finalisation of the matter, or if it is otherwise in the interests of justice to decide such grounds.

JUDGMENT

COPPIN AJA

[1] This is an appeal against a judgment of Van Voore AJ in the Labour Court, setting aside an award made by the second respondent (i.e. the arbitrator) in favour of the appellant's member Jongikhaya Chris Sinuko ("*Sinuko*") on the basis that the third respondent had no jurisdiction to arbitrate the dispute. The court *a quo* also ordered Sinuko to pay the first respondent's costs, such costs being limited to the costs of hearing the application for review and the drafting of heads of argument. The court *a quo* also remitted the matter back to the third respondent for determination before a different arbitrator. The appellant came before this Court with the leave of the court *a quo*.

[2] As stated, the court *a quo* upheld the review on one point, namely jurisdiction, but did not address the merits of the review. Accordingly, the two main issues that arise for determination in this Court is, firstly, whether the court *a quo* correctly held that the second respondent ought to have found that he had no jurisdiction to arbitrate the dispute before him and secondly, whether this Court may and should consider the other grounds of review (i.e. the merits of the review) even though it was not considered by the court *a quo*. These issues will be addressed in turn after a brief sketch of the background and salient facts of this matter.

[3] It was not disputed that Sinuko was employed by the first respondent as a tank fitter in its engineering business. He commenced his employment on or about 1 June 1997 and worked continuously for the first respondent until his dismissal, due to an incident that occurred at the first respondent's premises involving, principally, Sinuko and a supervisor of the first respondent, Elliot Johnson ("Johnson").

[4] The appellant and Johnson also happened to be members of different unions. Johnson was a member of MEWUSA whilst Sinuko was a member of the appellant ("NUMSA"). Sinuko's dismissal occurred on 29 September 2009 following upon an internal disciplinary hearing for which he was charged with alleged misconduct arising from the incident of 15 June 2009.

[5] There are slight differences in the versions regarding the finer details of that incident, but the main features were common cause. It was not disputed that Sinuko had injured his finger and had been to the company nurse for treatment. He had been booked-off sick for the day, before leaving the workplace he was wheeling a trolley, carrying his tools, to the prep-room. He was not wearing a helmet at the time. Johnson confronted him, stopped the trolley with his foot and enquired why Sinuko was not wearing a helmet. Sinuko's response was in issue. Sinuko said that he told Johnson that he was on his way home. Johnson's version, in essence, was that Sinuko snubbed him, asked why he had to wear a helmet and then told Johnson that he was not 'Simemo', referring to a former work colleague who had been dismissed after an incident involving that colleague and Johnson. According to Johnson,

Sinuko only told him as he was entering the prep-room that he was going home and Johnson told Sinuko why he had not said so in the first place.

[6] Johnson's version further was that Sinuko was aggressive and kept on confronting him pointing at him with his finger telling him that he was not 'Simemo'. Johnson testified that Sinuko indicated with his fingers that he was going to shoot Johnson. Johnson interpreted this as a threat. According to Johnson, while he was on the telephone, Sinuko came into his office and told him that he was not 'Simemo' and that Johnson would see what would happen.

[7] It is not disputed that efforts were made by a co-employee to resolve the matter. The incident ended after Johnson tried to prevent Sinuko, who was with a friend, work colleague and fellow-member of NUMSA, one Wayne Fredericks, from leaving the work premises. Sinuko denied threatening Johnson and said that he always spoke with his hands. Johnson on the other hand testified that during the confrontation he had warned Sinuko not to threaten him. Sinuko denied confronting Johnson and said that it was Johnson that provoked him.

[8] It was also not disputed that Sinuko then left the premises and when he reported for duty the next day he heard that disciplinary steps were to be taken against him. However, Sinuko continued to work until his dismissal and there were no further incidents between him and Johnson.

[9] Arising from the incident of 15 June 2009, Sinuko was charged with two counts of misconduct, namely, with gross insubordination and physically threatening a supervisor (Johnson). He was found guilty on both counts and dismissed on 29 September 2009.

[10] The appellant, on behalf of Sinuko, referred an unfair dismissal dispute to the third respondent for conciliation. As the dispute remained unresolved a certificate was issued to that effect and the matter was referred to arbitration before the second respondent, acting under the auspices of the third respondent.

[11] At the arbitration hearing, Johnson, Messrs. Jeffrey Solomons and Ronald Fisher, who allegedly witnessed aspects of the incident of 15 June 2009, gave evidence on behalf of the employer, the first respondent. Mr Leon Harmsen ("Harmsen"), who had led evidence on behalf of the employer at the disciplinary hearing and who sought Sinuko's dismissal, also gave evidence on behalf of the employer at the arbitration hearing. Sinuko gave evidence himself and called Wayne Fredericks as a witness.

[12] Having analysed and considered the evidence, the second respondent concluded, *inter alia,* that the employer's witnesses excluding Harmsen, 'were rather economical with the truth' and sought to support Johnson's version; that even though Sinuko's statement to Johnson that he was not 'Simemo' could have been seen by Johnson as a threat – the evidence did not support 'verbal abuse'; that Johnson must have done something to provoke Sinuko which caused Sinuko to become angry and 'behave in a manner that has not been seen in almost 18 years of working' at the first respondent; that the first respondent's disciplinary code indicated that 'insolence and/or using abusive and/or insulting language' towards fellow employees and a refusal to carry out lawful instructions, or perform duties, carries, as a suggested sanction for a first offence, a final written warning and thereafter, dismissal with notice; Harmsen was the only one who testified that the employment relationship between Sinuko and the first respondent had broken down, but his evidence in that regard was not convincing; that in the circumstances the dismissal was not a fair sanction and was not for a fair reason; that the written warning valid for 12 months should have been an appropriate sanction. Second respondent accordingly ordered the first respondent to re-instate Sinuko on the same terms and conditions that governed their employment relationship prior to Sinuko's dismissal and ordered that Sinuko reports for duty on 5 April 2010. Further, that the re-instatement was subject to a final written warning being given to Sinuko due to 'threatening behaviour' and the warning was to expire on 4 April 2011. The second respondent also ordered the first respondent to pay Sinuko remuneration in the amount of R28 751,80 (less all normal deductions) by 5 April 2010. The award was issued on 22 March 2010.

[13] The first respondent brought an application in the court *a quo* to review the award. One gleans from the founding affidavit that the first respondent sought to review the award on several grounds, but they related only to the merits. No grounds were raised in the founding papers with regard to the jurisdiction issue. However, it appears from the judgment of the court *a quo* that it was contended there, on behalf of the first respondent, that the real reason for Sinuko's dismissal was victimisation and that the arbitrator ought therefore to have found that he did not have jurisdiction to determine the dispute. The court *a quo* seems to have accepted a contention by the first respondent that when Sinuko raised the issue of 'union victimisation', the second respondent was supposed to stop the proceedings and advise Sinuko and the appellant that the matter ought to have been referred to the Labour Court. The court *a quo* made reference to two decisions, namely, *Chuma and Giflo Engineering (BOP) (Pty) Ltd*[1] and *Cusa v Tao Ying Metal Industries and Others*[2] and concluded, without any express, or illustrative, reasoning, that in its view the second respondent's approach in relation to the jurisdictional issue constituted a gross irregularity as contemplated in s 145 of the Labour Relations Act 66 of 1995 ('the Act'). The court *a quo* then proceeded to make the order which I mentioned in the first paragraph of this judgment.

[14] The fallacy in the judgment of the court *a quo* lays in the fact that it referred the matter back to the third respondent despite having found that the second respondent ought to have found that it had no jurisdiction to deal with the dispute. If it was indeed the finding of the court *a quo* that the true nature of the dispute was victimisation, because of Sinuko's union membership, then it was inappropriate and indeed wrong for it to refer the matter back to the third respondent for determination, because the third respondent would still not have had jurisdiction to determine such a dispute.

[15] In its judgment, the court *a quo* does not expressly state that that is what it found, instead it appeared to be critical of the second respondent's approach to the issue of jurisdiction and seemingly, regarded the second respondent's

---

[1] *Chuma and Giflo Engineering (BOP) (Pty) Ltd* (2009) 30 ILJ 2572 (BOA); [2009] 11 BALR 1097 (MEIBC).
[2] *Cusa v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) paras [65] to [66].

approach as irregular because 'when it appears that the reason relied upon by an employee party at arbitration concerns an alleged automatically unfair dismissal, then an arbitrator is required to determine the true nature of the dispute and then rule that he has no jurisdiction [as] the true nature of the dispute concerns an alleged automatically unfair dismissal' and that the second respondent, according to the court *a quo,* did not approach the matter accordingly. So it appears that the court a *quo* was merely critical of the second respondent's approach, but did not find that the third respondent had no jurisdiction, unless the referral back to the third respondent was purely erroneous.

[16] In *Chuma,* the Commissioner noted that the debate whether the jurisdiction of a statutory arbitrator was determined by the employee's characterisation of the nature of the dispute, or by the true nature of the dispute, was finally resolved by this Court in *Wardlaw v Supreme Moulding (Pty) Ltd.*[3] It was held in that case that the nature of the dispute (i.e. the reason for the dismissal) was now determined from the facts of the case and not by the employee's characterisation of the nature of the dispute. In *Chuma*, although the employees were charged with refusing to obey an instruction to work, it was clear from the notice read as a whole that the charge related to a collective participation in an unprotected strike. It was held that since the latter was the true reason for the dismissal, the bargaining council did not have jurisdiction to determine the dispute and ought to have referred the dispute to the Labour Court. The applicant's application in that case was accordingly dismissed. There the issue that had to be determined by the arbitrator was, what the true nature of the dispute was and whether the bargaining council had jurisdiction in the matter.

[17] In *Tao Ying,* the Constitutional Court confirmed that an arbitrator is required by the Act to deal with the substantial merits of the dispute and that this can only be done by ascertaining the real dispute between the parties. Moreover, that in deciding what the real dispute was, the arbitrator was not necessarily bound by the legal representative's characterisation of the dispute. The

[3] *Wardlaw v Supreme Moulding (Pty) Ltd* [2007] 6 BLLR 487 (LAC).

Constitutional Court held in that case that the labels that are attached to a dispute cannot change its underlying nature and that a Commissioner is required to take all facts into consideration. Of significance to the present case, the Constitutional Court held that 'the dispute between the parties may only emerge once all the evidence is in'.[4]

[18] In my view, the court *a quo* misconceived and misapplied the principles that are found in the very decisions which it referred to.

[19] In *Wardlaw,* this Court dealt with the Labour Court's jurisdiction under s 191(5) of the Act. It was stated that the two schools of thought that were applicable were the formalistic school and the substantive school. In terms of the former, the employee's characterisation of the nature of the dispute, or more particularly, the reason for the dismissal, would be decisive. If the allegation is made that the reason for the dismissal is one which falls within the jurisdiction of the Labour Court, that court would have jurisdiction even though it emerges later that the reason is, in fact, different and one that would have required the dispute to be referred to arbitration. In terms of the substantive school of thought, the employee's characterisation of the reason for the dismissal is only provisionally accepted until the Labour Court makes a finding as to the true reason for the dismissal. If the reason is the same as the one alleged by the employee, there is no difficulty and the court proceeds, but if it turns out to be a different reason and one in respect of which the Labour Court has no jurisdiction, the Labour Court should refuse to adjudicate the dispute (i.e. on the merits) and allow it to be referred to the Commission or bargaining council, as the case may be, that has jurisdiction. The court referred to criticisms of the two schools of thought. One of the possible criticisms of the substantive approach was that it subjects disputes to a duplication process and could cause undue delay. Having considered ss 157(5) and 158(2) of the Act, this Court came to the conclusion that it is inescapable 'that the formalistic school of thought does not enjoy the

[4] See *Tao Ying Metal* case (above) para [66].

recognition of the Act and that it is in fact the substantive approach that enjoys recognition by the Act'.[5]

[20] What is clear from *Wardlaw* is that a two stage process in the adjudication before the Labour Court was not necessarily being advocated. The Labour Court assumes jurisdiction on the basis of what the employee alleges the reason for the dismissal to be – but if it later becomes 'apparent' to the court that the reason for the dismissal is a different one and one in respect of which it does not have jurisdiction, the Labour Court should not adjudicate the merits of the dispute, but allow the matter to be referred to the right forum with jurisdiction in order for that forum to determine the merits of the dispute. In *Wardlaw*, this Court did not exclude the possibility that the true nature of the dispute may only become apparent once all the evidence has been led and the court has considered it. Generally, this is the time when the court will become aware of the true nature of the dispute. However, in *Wardlaw,* this Court also did not exclude the possibility that the true nature of the dispute may also become apparent earlier, i.e. before all the evidence is led. An example that readily comes to mind is if the issue of jurisdiction and the true nature of the dispute is separated from the merits of the dispute and raised at the outset of the proceedings, requiring the court to determine those issues on the evidential material available, or presented during that phase of the proceedings.

[21] There is no valid reason why the procedure that applies in the Labour Court does not also apply in arbitrations conducted in terms of or under the Act. In my view, the court *a quo* erred insofar as it implied that the second respondent should have stopped the proceedings the minute when statements were made during the cross-examination of Sinuko suggesting that he was being victimised because of his union affiliation. This most certainly cannot be said to have been the moment when the true nature of the dispute became 'apparent'. At no stage before the statement was made during the cross-examination did either the appellant, or Sinuko, or the first (or any of the respondents) allege, or suggest, that the reason for the dismissal

[5] *Wardlaw v Supreme Moulding* para [21].

was victimisation, neither did any of them raise an issue concerning the jurisdiction of the second, or third, respondent.

[22] In its request for a dispute resolution on behalf of Sinuko, the appellant described the dispute as being about unfair dismissal due to alleged misconduct. The certificate of outcome in respect of the conciliation also described the dispute as such. The description of the nature of the dispute was not in issue at the arbitration hearing. Moreover, it was not alleged by the appellant, or Sinuko, that the reason for the dismissal was victimisation. Instead, during Sinuko's examination, and after the representative indicated to the hearing that there was union rivalry in the company, he proceeded to put it to Sinuko that three witnesses had testified against him and they had said the same thing. Sinuko was then asked whether this was not 'perhaps because he has 'links with the other union'. Having clarified what union was being referred to, Sinuko answered in the affirmative. He was then asked whether there were any fights between the unions at the plant and Sinuko answered that there were days when there was a 'cold war' between them. By this, Sinuko explained, he meant 'a war of words'. Furthermore, it was never put to Sinuko that the reason for his dismissal was for anything other than misconduct. What Sinuko was asked under cross-examination was whether he believed that there was a plot to get rid of NUMSA shop-stewards and he answered that he believes so. Sinuko never said that the first respondent dismissed him, because he belonged to the appellant union. At best, Sinuko was suggesting that the individuals, that is, Johnson and the witnesses, possibly had a score to settle, but he did not impute this motive to the employer (i.e. the first respondent).

[23] The witness, Fredericks, was also asked in general, whether there was 'a concerted effort by MEWUSA to get rid of NUMSA members and set them up as shop-stewards and get them dismissed?' The witness answered in the affirmative. Once again, this was in general and Fredericks did not suggest that this is what motivated the employer to dismiss Sinuko. The representative of the first respondent was, in any event, at pains to point out that there was no merit in those allegations.

[24] In his award, the second respondent stated with regard to the issue of union rivalry the following: 'The evidence was presented about union rivalry and other issues. It is not necessary to refer to this evidence as my findings are not based on any such rivalry. Rivalry which is often present in a workplace where there is more than one union active. I do not see the applicant's membership of NUMSA as a reason for the dismissal. If that was the case then the matter should have been referred to the Labour Court.' It thus appears from the second respondent's award that the second respondent was very alive to the issues, including those concerning the nature of the dispute and the issue of jurisdiction. He, in essence, found that the true reason for the dismissal was not because of Sinuko's membership with another union, or victimisation, but was due to misconduct.

[25] In my view, the second respondent's decision on this issue was justified and one that a reasonable decision-maker could have made. The second respondent did not err by not stopping the hearing when evidence of general union rivalry, referred to earlier, was raised. In my view, that evidence did not even make it 'apparent' that the reason for Sinuko's dismissal was for a reason other than misconduct. Viewed in the context of all the evidence, the conclusion reached by the second respondent on the issue, was reasonable.

[26] In my view, the court *a quo,* accordingly, erred in its conclusion on the issue of jurisdiction. The order of the court *a quo* remitting the matter back to the first respondent for adjudication before a different arbitrator, indicates, in essence, that it too did not believe that the third respondent had no jurisdiction, but that it merely had difficulty with the second respondent's approach. The difficulty of the court *a quo* in that regard was clearly based on a misconception of the legal position.

[27] I now turn to consider the second issue, namely, whether this Court can determine the other grounds of review that were not dealt with by the court *a quo.* Counsel prepared supplementary heads of argument at our request on whether this Court may nevertheless in those circumstances determine the merits of those further grounds of review.

[30] On behalf of the appellant, it was submitted that in *Joseph v University of Limpopo and Others,*[6] this Court upheld an appeal from the Labour Court and went on to consider and determine the merits of grounds of review that were not considered by the Labour Court. However, it was readily conceded that in *Joseph* the court did not 'indicate the basis of doing what it did'. Notwithstanding, it was submitted that this Court has the power to determine the other grounds in terms of sections 173, 174 and 175 of the Act. Reference was also made to s 173(1)(a) of the Act in terms of which this Court has exclusive jurisdiction to hear and determine all appeals against the final judgments and the final orders of the Labour Court. It was submitted that the judgment of the court *a quo* was a 'final judgment', that the order reviewing and setting aside the award of the second respondent was a 'final order' and that in order to determine whether the award falls to be reviewed and set aside this Court must determine whether the award is reviewable on the other grounds. (In the supplementary heads of argument of the appellant these other grounds are referred to as 'the second ground'.) It was further submitted on behalf of the appellant, that in circumstances where the second ground was fully canvassed in the papers placed before this Court and in the heads of argument filed by the parties, 'it is both pragmatic and in the interest of justice (given the lengthy period for which the employee has already been unemployed) that the second review ground be determined by this Court'. Reference was made to this Court's power in terms of s 175 to sit as a court of first instance, if the Judge President so directs, and to make an order which the Labour Court would have been entitled to make. Counsel for the appellant, in the written heads, attempted to distinguish from the facts of the present matter, the facts in *Shoprite Checkers (Pty) Ltd v CCMA and Others*[7] in which the Supreme Court of Appeal criticised this Court for exercising, not its additional appeal powers, but 'the fairly circumscribed' review powers that the Labour Court has in terms of s 145(2) of the Act. According to the appellant 'it was the exercise of the review powers itself which was the basis of its decision to uphold the appeal (paras 30 to 31) and in any event it was

[6] *Joseph v University of Limpopo and others* (2011) 32 ILJ 2085 (LAC).
[7] *Shoprite Checkers (Pty) Ltd v CCMA and Others* 2009 (3) SA 493 (SCA).

not dealing with a case in which a direction had been made in terms of section 175 of the LRA'.

[31] On behalf of the first respondent, it was submitted that this Court does not have the power to make a decision on the further grounds of review, but was obliged to refer the matter back to the Labour Court so that it could deal with them. Strong reliance was placed on the *Shoprite Checkers* decision[8] where the Supreme Court of Appeal stated the following:

> '[29] ....In our view, the LAC appears in this particular instance to have misconceived the nature of its function. The LAC concluded that Waglay J ought to have finalised the review application instead of setting aside the arbitral award and remitting the matter to the CCMA for a hearing de *novo*. Ordinarily, in those circumstances the LAC ought itself to have remitted the matter to the Labour Court for finalisation. It chose instead to finalise the matter itself. Given the inordinate length of time that had passed since the dismissal, one would hesitate to criticise the approach of the LAC.
>
> [30] In following this approach, however, it effectively stepped into the shoes of the Labour Court and was thus exercising, not its traditional appeal powers, but rather the fairly circumscribed s 145(2) review powers of the Labour Court. Its warrant for the interference with the award of the arbitrator was narrowly confined...'

[32] In light of the judgment in *Shoprite Checkers,* it was submitted on behalf of the first respondent, that this Court does not have 'original power to review' the awards of the CCMA, or bargaining councils and may only deal with those matters in terms of its appeal powers. It was argued that the issue must first have been decided by the Labour Court and since there is no appeal before this Court concerning the further grounds of review, this Court has no power to deal with them. It was, furthermore, submitted on behalf of the first respondent, that this Court should decline any invitation to sit as a court of first instance, because of what the Constitutional Court had said in *Bruce and Another v Fleecytex, Johannesburg CC and Others*[9] about appeal courts sitting as courts of first and last instance. There, it was, *inter alia*, stated that it

[8] In particular paragraphs [29] and [30] of that decision.
[9] *Bruce and Another v Fleecytex, Johannesburg CC and Others* 1998 (2) SA 1143 (CC) para [8].

was not ordinarily in the interest of justice if that occurred, in circumstances where there was no possibility of a further appeal; and that there was a likelihood that a decision would be correct if more than one court has considered the issue raised, because the losing party has an opportunity of challenging the reasoning in the first judgment and improving its arguments raised in respect of that judgment. It was submitted, finally, on behalf of the first respondent, that since the other appeal grounds were not fully canvassed in the court below, it would be unfair to deal with them on appeal before this Court.

[33] I am of the view that there is some merit in the first respondent's argument on this point. Firstly, this is not a case in which the Judge President has indicated that this Court will sit as a court of first instance as envisaged in section 175 of the Act. Moreover, in my view, it is not a proper case for this Court to sit on as a court of first instance. The power envisaged in s 175 of the Act must be sparingly exercised and should be reserved for exceptional situations. One is mindful of what the Constitutional Court had to say in *Fleecytex* about the benefits and preference of having other courts consider the issue before it is dealt with by this Court on appeal, in circumstances where there was no reasonable possibility of a further appeal from the appeal court. But, then again, this Court is often confronted with the same situation it was confronted with in *Joseph*. There an employee who had been dismissed by the employer had been reinstated in terms of an arbitration award made in his favour. The employer sought to review the award on several grounds in the Labour Court. The court, however, found in favour of the employer on one of the grounds and held that in those circumstances it was unnecessary to consider the other grounds of review. This Court was confronted with that situation in the appeal brought by the employee in *Joseph*. The question is what should this Court do regarding the remaining issues, or grounds of review that were raised in the proceedings before the Labour Court, but were not dealt with by it?

[34] In *Joseph,* this Court, having found that the Labour Court erred in respect of the one ground that it had dealt with, went on to consider the other grounds of review in order to determine whether the award should, nevertheless, be set

aside on any of those other grounds. It was concluded that the other grounds were without merit. The appeal was upheld and the order of the Labour Court was set aside and was replaced with an order that the review was dismissed with costs. It was not an issue in that matter whether this Court had the power to do what it did, and it was, apparently, assumed that this Court had the necessary power, or competence, to consider the other grounds of review.

[35] The impression gained from a cursory reading of the passages, containing the criticism and which I quoted earlier from the judgment of *Shoprite Checkers,* is that this Court does not have the competence at all to do what it did in that case, and by implication, what it did in *Joseph*. An analysis of that judgment, in my view, confirms the contrary.

[36] I doubt the validity of the Supreme Court of Appeal's criticism of the approach of this Court. While it was the higher appeal court, the SCA appears to have assumed that it had greater appeal powers than this Court, especially for dealing with the situation that this Court was confronted with in that case. Because, having criticised this Court for exercising review powers that it did not have; for 'stepping into the shoes' of the Labour Court; for dealing with the matter itself and for not remitting it to the Labour Court, the SCA, which also does not have review powers in terms of the Act, nevertheless, did exactly what it said this Court could not do. Instead of remitting the matter to the Labour Court, it finalised the matter itself.

[37] The powers of the SCA to make orders on the hearing of appeals to it derives from the Constitution, but also, in particular before the Superior Courts Act of 2013, from the provisions of s 21 and s 22 of the Supreme Court Act[10]. For present purposes s 21 is not relevant. Section 22 provides:

> 'The appellate division or a provincial division, or a local division having appeal jurisdiction shall have power-
>
> *(a)* on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such a division, or to remit the

[10] Act 59 of 1959. Section 19(d) of the Superior Courts Act, 10 of 2013, which commenced on 23 August 2013, has similar wording to s 22 of Act 59 of 1959.

case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary; and

(b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.' (emphasis added)

[38] The power of this Court to make orders in respect of appeals before it ultimately derives from the Constitution, but more immediately, particularly, from s 174 of the Act, which (similarly to s 22 of the Supreme Court Act) provides:

'The Labour Appeal Court has the power—

(a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by the Labour Appeal Court, or to remit the case to the Labour Court, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Labour Appeal Court considers necessary; and

(b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order that the circumstances may require.' (emphasis added)

[39] It is apparent from a reading of the sections quoted, that this Court and the SCA have virtually the same statutory powers on appeal, save that the powers of this Court are confined to appeals from the Labour Court. The powers contained in s 22(b) of the Supreme Court Act and s 174(b) of the Act, respectively, are identical. Section 22(b), particularly the latter part thereof, which reads '... to give any judgment which the circumstances may require' and which I shall refer to as 'the auxiliary section', has been interpreted by the Appellate Division(the 'AD') to be auxiliary and not only limited to matters arising from the appeal itself, such as, for example, a remittal to the court of first instance for the hearing of further evidence, or for argument on the quantum of damages, or for the quantum of damages to be fixed by that court,

but as empowering the AD to itself determine the *quantum* in appropriate cases where the court of first instance had merely dealt with the merits of a claim, had dismissed it on the merits and had not dealt with the issue of damages ,or its quantum at all.

[40] In *Neethling v Du Preez: Neethling v Weekly Mail,*[11] the trial court had found that although the matter published was defamatory of the appellant, the publication was justified and the appellant was, accordingly, not entitled to any damages. Counsel for the respective parties had agreed that if the appeal was successful, the matter should be referred back to the trial court in order for it to determine the *quantum* of damages. The AD, having found that the appeal (i.e. on the merits) should succeed, went on to consider the issue of the damages. It held that by virtue of the auxiliary section it had the power to determine the damages itself and even though it was a function which lies peculiarly within the province of the trial court, it did not have to remit the matter to the trial court as such a course might prove inconvenient to all concerned. Having related how remittal may, in certain circumstances, serve no useful purpose, other than cause needless delay and additional costs, Hoexter JA, who gave the unanimous judgment, stated, in support of the view that the auxiliary section gave additional power: 'It is unnecessary, in my view, to enlarge upon the incongruous results flowing from the narrow construction of the auxiliary provision for which the respondents contend. The fact of the matter is that in a number of appeals, each resulting from an unsuccessful action for damages in which the court below has erroneously non-suited the plaintiff on the merits, this court has made orders in regard to the *quantum* of damages which involve a clear negation of the restrictive interpretation. A survey of its reported decision[s] reflects that in the past, and in the very sort of situation now under discussion, this court has, in appropriate circumstances, itself fixed the damages to be awarded to the plaintiff'.[12] Having considered in what circumstances the AD would do so, Hoexter JA, pointed out that it was an unusual step to depart from the general rule that damages should be left to be determined by the trial court, but such departure

[11] *Neethling v Du Preez: Neethling v Weekly Mail* [1995] 1 All SA 441; 1995 (1) SA 292 (A) at 297-302.
[12] At 298 C-E.

may be necessitated by special circumstances and that each case must be dealt with on its own particular facts. An objection by a party to the AD itself determining the damages was described as 'a factor operating powerfully against the departure from the general rule'.[13]

[41] The auxiliary provision is also the source of the appeal court's power:-*inter alia*, to amend pleadings on appeal, without remitting the matter before it to the lower court;[14] to postpone an appeal;[15] to stop proceedings, eg. to allow for the joinder of a party;[16] to suspend the execution of an order.[17] The exercise of all these auxiliary powers is exceptional and convenience is also important. In *Shoprite,* by not referring the matter back to the Labour Court and finalising the matter itself, I venture to suggest, the SCA exercised a power derived from the auxiliary provision. The SCA itself did not identify the source of that power, but a consideration of the other sources of its powers, leaves one with the distinct impression that the auxiliary provision was the source of the power exercised in that matter. By the time the matter came before that court, a substantial delay had already occurred and remitting the matter to the Labour Court would have entailed yet a further delay. The exercise of the power was justified given the circumstances in that case. However, in that matter, this Court also dealt with the matter itself because of the inordinately long delay and the possibility of a miscarriage of justice that would otherwise have occurred. As I pointed out earlier, s 174(b) of the Act contains an identical provision to the auxiliary provision. If the SCA had the power, which it exercised in terms of the auxiliary provision, then this Court most certainly had the same power. The criticism of this Court for finalising the matter itself, given the circumstances, does therefore not appear to be valid, or justified.

[42] The justification for the existence of the power is the same as the justification for the power to determine damages, which the AD held it had in *Neethling.*

---

[13] At 302 B
[14] See eg. *Cooper and others NNO v Syfrets Trust Ltd* 2001 (1) SA 122 (SCA) at 133 B-D.
[15] See eg. *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at494D-G;495 C-D.
[16] See eg. *Pretorius v Slabbert* 2000 (4) SA 935 (SCA) at 939 A-G.
[17] See eg. *Voortrekker Pers Bpk v Rautenbach* 1947 (2) SA 47 (A).

Giving s 174(b) of the Act, or the latter part of that section, a restricted meaning, would, in practice, inhibit the expeditious despatch of litigation and, in certain cases cause a miscarriage of justice. It is frequently the case with appeals before this Court involving a review of an award that only one, or so, grounds, out of a number, were dealt with by the Labour Court and in respect of which it dismissed the application for review, or granted the application and set aside the award, but without saying anything about the other grounds of review. It would be incongruous to suggest that in every case where the appeal (involving the one ground) was successful, this Court ought to remit the matter to the Labour Court to decide on the other grounds that it did not consider initially, even though such a course might result in an unacceptable prolongation of the matter, or otherwise cause a miscarriage of justice. It is likely that in many appeals, excluding those in *Joseph* and *Shoprite*, this Court has, in appropriate circumstances, itself considered the other grounds of review and finalised the application, as the Labour Court ought to have done.

[43] In my view, in light of the above, this Court is legally competent, in terms of the latter part of s 174(b) of the Act, to finalise a matter on appeal before it and not remit the matter to the Labour Court if there has already been an inordinate delay in finalising a matter, or its remittal would entail a further long delay and further costs, or if there is a reasonable possibility of a miscarriage of justice occurring due to a remittal. The exercise of the power would depend on the facts and circumstances of the matter before this Court. In considering whether to finalise the matter itself, the remarks of the Constitutional Court in *Fleecytex* have to be taken into account. In matters involving a review of an award, the general rule is that it is the function of the Labour Court to review awards. A departure from that rule on appeal is exceptional and depends on whether, in a particular case, the interests of justice and convenience will best be served by this Court finalising the matter and not remitting it to the Labour Court. Other factors of importance include whether the issues were fully canvassed in the papers before the Labour Court; whether there is likely to be prejudice if the matter is not remitted and whether finalisation of the matter by this Court is requested by the parties on both sides.

[43] I now proceed to consider whether in all the circumstances of this appeal, this Court should go on to decide the other grounds (or 'second ground') of review, or whether the better course would be to remit the matter to the Labour Court to deal with those grounds first.

[44] The appellant has advanced a few reasons why this Court should consider the 'second ground of review' and finalise, as it were, the application. Firstly, it is submitted that this Court has to exercise the power, because it has the power. This on its own cannot be a reason why this Court should exercise the power in any particular case. There must be exceptional circumstances present and it must be in the interest of justice for this Court to, essentially, perform what is essentially a function of the Labour Court. Secondly, it is submitted that the second review ground has been fully canvassed in the papers and in the heads of argument filed by the parties in respect of the hearing before this Court. This submission purports to address the issue of convenience. Thirdly, it is submitted that Sinuko has already been unemployed for a lengthy period, and fourthly, that in light of the second and third reasons 'it is both pragmatic and in the interests of justice' that the second review ground be determined by this Court. With regard to the third reason, we have not been provided with particular detail in respect of the period for which Sinuko has been unemployed. From the record we learn, *inter alia,* that he was dismissed by the first respondent on 29 September 2009, after the disciplinary enquiry; the award reinstating him was submitted on 22 March 2010; the application to review the award was brought on or about 10 May 2010 and the judgment of the court *a quo* in respect of the review was delivered on 1 February 2012. The application for review did not suspend the award. We are not told whether Sinuko was reinstated in compliance with the award and what transpired thereafter.

[45] The first respondent objects to this Court dealing with the other grounds of review. Its main point is that this Court does not have the legal competence or power to do so. As already pointed out, there is no merit in the point. However, the first respondent, with reference to the *Fleecytex* decision, also submits that it would not be in the interest of justice for this Court to sit as a

court of first instance in respect of grounds of review that were not dealt with at all by the court *a quo.* In this regard it is submitted that this Court does not have the benefit at all of the judgment and reasoning of the court *a quo*.

[46] Considering all of the facts and circumstances, including the submissions of the parties, I am of the view that, on a balance, referring the matter back to the Labour Court would just compound, what I consider to be an inordinate delay in the finalisation of this matter. The interests of justice will be best served if this Court finalises the matter itself.

[47] Regarding the remaining grounds of review, the first respondent' counsel submitted that the second respondent 'seemed to ignore the principle that general staff are subordinate to managers' and that the matter was not about Sinuko or Johnson, but about whether aggrieved employees have the right to threaten managers and whether employers may excuse its employees from issuing threats. In support of this argument counsel referred to *National Union of Mineworkers and Others v Black Mountain Mining (PTY) Ltd*[18] where the court, *inter alia*, dealt with the question of misconduct by employees, in particular shopstewards, during a strike, and the right of an employer to take action against employees who use violence and threats to exert their will in the course of negotiations or a strike. Counsel, in particular, attacked the second respondent's decision not to confirm the dismissal of Sinuko.

[48] It was submitted on behalf of the first respondent, clearly unjustifiably in my view, that the evidence shows that Sinuko threatened to kill a member of management and that Sinuko considered this resort to 'self-help' to be justified, because the management used illegitimate means to get at him. In support of the sanction of dismissal, counsel also submitted, again unjustifiably, in my view, that Sinuko 'does not and will not respect authority' and that 'whenever he feels a sense of righteous indignation he intends to throw his weight around the workplace and makes threats'. All of this, so it was argued, 'provides evidence of a breakdown in the employment relationship'. It was also submitted that the Labour Court has held on more

[18] *National Union of Mineworkers and Others v Black Mountain Mining (PTY) Ltd* (2010) 31 ILJ 387 (LC*).*

than one occasion that employees, who engage in sustained defiance of authority as a means to air their grievances, must understand that they do so at their own peril and should not be overly surprised if the outcome of their crusade is dismissal,

[49] These submissions made on behalf of the first respondent, profess to be made on the basis of the evidence that was before the second respondent, but in many respects ignores the evidence or misinterprets it.

[50] The ultimate issue for determination in the arbitration was whether the conduct of Sinuko was so outstandingly bad as to warrant his dismissal. As mentioned earlier, the second respondent found that Sinuko was insolent and had threatened Johnson, but that his conduct did not amount to verbal abuse. These findings cannot be said to have been unreasonable. The evidence, in my view, and contrary to the submissions made on behalf of the first respondent, does show that the entire incident was, indeed, about Sinuko and Johnson on a personal level and not about Sinuko against management, or about his attitude toward management in general. Sinuko and Johnson were one time close friends, who visited each others' homes and who clearly had an informal relationship. At some stage they belonged to the same union. Their relationship became strained, not because of Sinuko's attitude towards management, but probably after Sinuko joined a rival union and particularly, after the "Simemo" incident.

[51] There is no evidence at all that Sinuko had at any stage, during his lengthy period of employment with the first respondent, misconducted himself towards management, or at all. Johnson himself testified that he had known Sinuko for 14 years and that it was the first time he saw Sinuko behave in the manner he behaved during the incident. It is not Sinuko that confronted Johnson on the day of the incident, but Johnson who confronted him. Even if Johnson was, arguably, entitled to ask Sinuko about the wearing of a hardhat, one must not overlook the manner in which Johnson did so, which could have provoked Sinuko and caused him to react.

[52] Having found Sinuko had misconducted himself, the second respondent was required to decide whether, in his view, the sanction of dismissal, imposed by the employer, the first respondent, was justified and fair, given the circumstances.[19] He found that it was not fair and justified in light of the following. In terms of the second respondent's disciplinary code insolence and the use of abusive and/or insulting language towards fellow employees and a refusal to carry out a lawful instruction or perform a duty(-ies) carried a sanction of a final written warning for a first offence; Sinuko, who had been in the employ of the first respondent for 18 years, had a clean disciplinary record; following the incident, Sinuko was not suspended, but was allowed to continue working until the conclusion of the disciplinary hearing and his summary dismissal (i.e for about two-and-half months) and he would have come into contact with Johnson during that time; Johnson had, in the interim, been transferred to another department.

[53] The reviewing court must decide whether the decision of the second respondent is one which a reasonable arbitrator could not reach.[20] Taking all the circumstances into account it cannot be found that a reasonable arbitrator, or decision-maker, would not have come to the same conclusion as the second respondent. In my view, the first respondent never established an irretrievable breakdown of the employment relationship between itself and Sinuko. A fact which the second defendant did not mention, or allude to, is that the witness that gave evidence at the disciplinary hearing that the employment relationship had broken down, was the very person that presented the case for the first respondent at that hearing, namely, Harmsen. He had no personal knowledge of the incident and in the final analysis, was expressing an opinion which was, most certainly, not based on fact and was biased. No weight could be given to such an opinion, in light of the established facts.

[54] In conclusion, the court *a quo* clearly erred in reviewing and setting aside the award for the reason that it did and in respect of that very reason. Regarding

---

[19] See: *Wasteman Group v South African Municipal Workers' Union* [2012] 8 BLLR 778 (LAC*); Fidelity Cash Management Services v CCMA and Others* (2008) 29 ILJ 964 (LAC).
[20] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC).

the other grounds of review, It cannot be found that the second respondent's decision was unreasonable and would not have been made by a reasonable decision-maker, or arbitrator.[21] As regards costs, I am of the view that there is no reason why costs should not follow the result.

[55] In the result, the following is ordered:

1. The appeal is upheld.

2. The order of the court *a quo* is set aside and is substituted with the following order:

   'The application to review the award of the second respondent is dismissed with costs'.'

3. The first respondent is ordered to pay the costs of the appeal.

_____

P Coppin

Acting Judge of the Labour

Appeal Court

I agree:

_____

B Waglay

Judge President of the

Labour Appeal Court

[21] *Herholdt v Nedbank Limited* [2013] JOL 30796 (SCA).

I agree

_____

L P Tlaletsi

Acting Deputy Judge President

of the Labour Appeal Court

APPEARANCES

FOR THE APPELLANT	Adv. MS M Norton
	Instructed by Cheadle Thompson & Haysom
FOR THE FIRST RESPONDENT	Adv. C S KAHANOVITZ SC
	Instructed by Louis Van Zyl Attorney