CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 49/20

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	Applicant
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
FEIZAL FATAAR N.O.	Second Respondent
SOLIDARITY TRADE UNION	Third Respondent
UASA	Fourth Respondent
METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL	Fifth Respondent
MOTOR INDUSTRY BARGAINING COUNCIL	Sixth Respondent
SAACSA	Seventh Respondent
WIDNEY TRANSPORT COMPONENTS (PTY) LIMITED	Eighth Respondent
RAMSAY ENGINEERING (PTY) LIMITED	Ninth Respondent
EURO METAL FINISHES (PTY) LIMITED	Tenth Respondent
AUTO INDUSTRIAL MACHINING DIVISION	Eleventh Respondent
ISANDO FOUNDRY DIVISION	Twelfth Respondent
HUBCO FORGINGS DIVISION	Thirteenth Respondent

AUTO INDUSTRIAL GROUP (PTY) LIMITED	Fourteenth Respondent
AUTO INDUSTRIAL FOUNDRY DIVISION	Fifteenth Respondent
AUTOCAST SA (PTY) LIMITED	Sixteenth Respondent
AUTOCAST SA (PTY) LIMITED ALUMINIUM	Seventeenth Respondent
BORBET SA (PTY) LIMITED	Eighteenth Respondent
DANA SPICER AXLE SA (PTY) LIMITED	Nineteenth Respondent
MW WHEELS SA (PTY) LIMITED	Twentieth Respondent
SP METAL FORGINGS BOKSBURG (PTY) LIMITED	Twenty-First Respondent
SP METAL FORGINGS UITENHAGE (PTY) LIMITED	Twenty-Second Respondent
TORRE AUTOMOTIVE (PTY) LIMITED	Twenty-Third Respondent
ZF LEMFORDER SA (PTY) LIMITED	Twenty-Fourth Respondent
MALBEN ENGINEERING CC	Twenty-Fifth Respondent

Neutral citation:	*National Union of Metalworkers of South Africa v Commission for Conciliation, Mediation and Arbitration and Others* [2021] ZACC 47
Coram:	Khampepe ADCJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J
Judgments:	Tlaletsi AJ (majority): [1] to [78] Jafta J (dissenting): [79] to [117]
Heard on:	4 May 2021
Decided on:	10 December 2021

Summary: Labour Law — Collective bargaining — Bargaining councils — Dispute about demarcation between sectors and areas — Section 62 of the LRA

Demarcation — Dispute — Review of CCMA arbitration proceedings — decisions and awards of arbitrators — Power of the Labour Court — substitution of the award

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ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court):

1. Leave to appeal is granted.
2. The appeal is dismissed.

JUDGMENT

TLALETSI AJ (Khampepe ADCJ, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J and Tshiqi J concurring):

Introduction

[1] At the heart of this application is the power of the Labour Court to review and substitute a demarcation award issued by a commissioner in proceedings conducted in terms of section 62 of the Labour Relations Act[1] (LRA). The dispute in this matter turns on whether some of the respondents fall within the jurisdiction of the Motor Industry Bargaining Council (MIBCO) or the Metal and Engineering Industries

[1] 66 of 1995.

Bargaining Council (MEIBC). The applicant seeks leave to appeal against the whole judgment and order of the Labour Appeal Court,[2] which upheld the decision of the Labour Court.[3] The Labour Court had reviewed and set aside a demarcation award issued by a commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA) and substituted it with a ruling that several of the respondents fall within the scope of the MIBCO.

Parties

[2] The applicant is the National Union of Metalworkers of South Africa (NUMSA), a registered trade union acting in its own right and on behalf of its members employed by the eighth to the twenty-fifth respondents.

[3] The first respondent is the CCMA, a dispute resolution institution established in terms of the LRA. The second respondent is the commissioner of the CCMA who arbitrated the dispute and issued the impugned award. The third and fourth respondents are registered trade unions whose members are employed by the eighth to the twenty-fifth respondents.

[4] The fifth and sixth respondents are the MEIBC and MIBCO respectively, both of which are statutory bodies registered in terms of the LRA. The seventh respondent is the South African Automotive Component Suppliers Association, an employers' organisation registered in terms of the LRA.

[5] The eighth to twenty-fifth respondents are business entities that employ members of NUMSA. These respondents shall henceforth be referred to as the respondent entities.

[2] *National Union of Metalworkers of South Africa v Commission for Conciliation Mediation and Arbitration* [2020] ZALAC 8; (2020) 41 ILJ 1629 (LAC) (Labour Appeal Court judgment).

[3] *Auto Industrial Group (Pty) Ltd v CCMA; MIBCO v CCMA* (2019) 40 ILJ 550 (LC) (Labour Court judgment).

Litigation history

CCMA

[6] The respondent entities referred a demarcation dispute to the CCMA in terms of section 62 of the LRA. They asked the CCMA to determine whether, as vehicle component manufacturers, they fall within the scope of either the MEIBC or the MIBCO. Pre-arbitration hearings were conducted as well as inspections *in loco* at the respondent entities' premises. The respondent entities were, at the time, demarcated within the scope of the MEIBC in terms of a determination made by the erstwhile Industrial Tribunal under the Industrial Conciliation Act[4] published by the Minister of Labour on 30 November 1962. That legislation was repealed and replaced with the current 1995 LRA.

[7] It became common cause at the arbitration that the respondent entities were manufacturers of various types of motor components. They supply their products directly to Original Equipment Manufacturers (referred to as OEMs) and to the suppliers of OEMs. They were therefore, in this sense, part of what was referred to as the motor vehicle value chain, or supply value chain.

[8] It is significant that unlike the MEIBC, the MIBCO is structured to provide for separate negotiations for component manufacturing establishments, referred to in the MIBCO main agreement as "Chapter III establishments".[5] The respondents contended therefore that (a) components manufactured by them are executed and/or fabricated, by way of specific motor vehicle industry specifications; (b) their customers are either original motor vehicle manufacturers, and/or first or second tier manufacturers within the value chain; and (c) their competitors fall within the scope and ambit of the MIBCO.

[4] 28 of 1956.

[5] Chapter III establishments are component manufacturing establishments, registered as such in terms of Chapter III of Division C of the MEIBC's main agreement.

[9] The respondent entities also relied on the provisions of the main agreements of the two bargaining councils. They contended that, given that they are manufacturers of motor components, their business activities fall squarely within the exclusionary provisions in the main agreement of the MEIBC. The main agreement of the MEIBC expressly excludes the "motor industry" which is defined as "the manufacture of motor vehicle parts and/or accessories and/or spares and/or components in establishments laid out for and normally producing metal and/or plastic goods of a different character on a substantial scale". They contended that their business activities have moved on from that of engineering to the motor industry, and that any engineering is either ancillary or minimal in relation to their main activities, which are motor activities.

[10] NUMSA and the MEIBC's position was that the respondent entities are properly demarcated under the scope of the MEIBC. They backed their position by relying on the document "Determination Demarcation: Manufacture of motor vehicle parts and/or spares and/or accessories and/or components of motor vehicles" made under the Industrial Conciliation Act dated 30 November 1962.[6] They alleged that, in terms of this determination, 10 of the respondent entities[7] were placed under the scope of the MEIBC as from 2 January 1963. NUMSA and its allies contended that these 10 entities should remain within the MEIBC since that determination is binding. As for the rest of the entities, NUMSA contended that the provisions of the main agreements of the two bargaining councils should be afforded a wide and purposive interpretation. This contention was intended to counter the respondents' argument that these entities should likewise be demarcated within the scope of the MIBCO because they also manufacture motor components that are excluded by the definition of the scope of the MEIBC.

[11] The matter took some time before it reached the Labour Appeal Court. It is therefore necessary to set out the process followed in the arbitration in relation to the

[6] The document was published in Government Gazette 384 of 1962.

[7] Auto Industrial Foundry Division, Autocast SA (Pty) Ltd, Autocast SA (Pty) Ltd Aluminium, Borbet SA (Pty) Ltd, Dana Spicer Axle SA (Pty) Ltd, MW Wheels SA (Pty) Ltd, SP Metal Forgings Uitenhage (Pty) Ltd, ZF Lemforder SA (Pty) Ltd, SP Metal Forgings Boksburg (Pty) Ltd and Malben Engineering CC.

procedure prescribed by the LRA. The arbitration was heard in February 2017. During March 2017, at the request of the commissioner, the parties submitted written arguments in support of their respective positions. Despite the objections from the respondents, the commissioner rescheduled another hearing for certain issues to be clarified. At the conclusion of these proceedings, the commissioner undertook to render the award within 14 days.

[12] On 28 September 2017, the CCMA's Head Office Case Management Officer: Arbitration and Post-hearings, addressed a letter to the respondents' attorneys confirming that the award had been issued by the commissioner and submitted to the National Economic Development and Labour Council (NEDLAC) for consultation in terms of section 62(9) of the LRA. On 23 October 2017, the respondent companies' attorney wrote to the CCMA complaining that the award was considerably delayed and enquired when it would be released. On 24 October 2017, the CCMA responded by indicating that the award had gone through the perusal process and had been submitted to NEDLAC for consultation on 23 October 2017. The correspondence thus suggests that there was consultation with NEDLAC on at least two occasions.

[13] On 28 November 2017, some nine months after the hearings closed, the respondents received the award. This was after an exchange of further correspondence between the respondents' attorneys and the CCMA making enquiries about the release of the award.

Award

[14] The commissioner made the following findings in the award. He accepted that if one considers the certificates of registration of the two bargaining councils, it was possible that the respondent entities (except for Torre Automotive) fall within the scope of the MIBCO. However, since the 1962 determination placed the said entities within the scope of the MEIBC, he had to find that they should remain as such, as he was bound by the determination which had not been repealed. He acknowledged that other companies competing with the respondent entities were placed within the scope of the

MIBCO. However, since no evidence was tendered to explain this anomaly, he did not accept the contention that the respondent entities should be similarly demarcated.

[15] The commissioner further reasoned that the activities of a company should not be determined by the end product it manufactures, but by the nature of the enterprise in which the employees and the employer are associated for a common purpose. Moreover, the nature of the enterprise should be determined by the process through which the end product is manufactured. He held that since the 1962 determination placed the 10 entities within the MEIBC, it meant that the activities of their businesses are engineering and, as such, they do not form part of the value chain of motor components.

[16] As for the rest of the entities, the commissioner found that given that there was no clear determination regarding their classification, their main activities should fall within the scope of the MIBCO. As regards Torre Automotive, which manufactures battery casings through a process of plastic injection moulding, the commissioner concluded that there was no substantial evidence as to the facts and reasons why its competitor, Principle Plastics CC, was demarcated to the MEIBC.

[17] In the result, the commissioner made the following award:

> "The applicants, Auto Industrial Foundry Division, Autocast SA (Pty) Ltd, Autocast SA (Pty) Ltd Aluminium, Borbet SA (Pty) Ltd, Dana Spicer Axle SA (Pty) Ltd, MW Wheels SA (Pty) Ltd, SP Metal Forgings Uitenhage (Pty) Ltd, ZF Lemforder SA (Pty) Ltd, SP Metal Forgings Boksburg (Pty) Ltd and Malben Engineering CC fall within the scope and registration of the [MEIBC].
>
> The applicants, Auto Industrial Machining Division, Isando Foundry Division, Hubco Forgings Division, Widney Transport Components (Pty) Ltd, Ramsay Engineering (Pty) Ltd, and Euro Metal Finishes (Pty) Ltd, fall within the scope and registration of the [MIBCO]. They are demarcated from the scope and registration of the [MEIBC] to that of [MIBCO].
>
> Torre Automotive falls within the scope and registration of the [MEIBC]."

[18] It bears mention that, on 21 November 2017, shortly before the respondents received the CCMA's award, the respondents also received a copy of a letter addressed from the Executive Director of NEDLAC to the National Director of the CCMA dated 21 November 2017. The letter confirmed that the demarcation dispute was indeed referred to NEDLAC in terms of section 62(9) of the LRA. It also confirmed that the NEDLAC Standing Committee had held a meeting with the commissioner on 7 September 2017 to raise concerns that they had with the commissioner's initial award. The letter stated that after due consideration, the Standing Committee was unanimously of the view that it could not support the revised award, which it said had failed to satisfactorily address the areas of concern highlighted in the original award. However, it further stated that, notwithstanding its decision not to support the award, because the matter had dragged on for almost three years, NEDLAC recommended that the CCMA consider publishing the award without any further delay.

[19] NEDLAC had no problem with the demarcation of Torre Automotive, however, it raised the following areas of concern with the commissioner's revised award:

> "i. an overwhelming reliance on the 1962 determination in arriving at the final determination;
> ii. a complete rejection of the value chain argument presented by the applicants;
> iii. inappropriate and unnecessary weight being attached to the history and different collective bargaining practices and structures as between the two bargaining councils;
> iv. a rejection of the argument that a company's product is relevant to determining its industry, and not necessarily the nature of the enterprise in which employees and the employer are associated for a common purpose; and
> v. inconsistency in the final demarcation of the 18 applicants 'even on the basis of the arbitrator's own reasoning and rationale'."

Labour Court

[20] Aggrieved by the award of the commissioner, the respondents instituted proceedings in the Labour Court to have the award reviewed and set aside. There were

three review applications that were consolidated. The first was filed by 12 of the respondent entities[8] (they were referred to as the "demarcation applicants" in the Labour Court). They contested the finding that they were to remain demarcated within the MEIBC. The second application was brought by the MIBCO with essentially the same objectives as the application brought by the 12 entities. The third application was brought by NUMSA, which sought to review and set aside the part of the award that determined that the eighth to thirteenth respondents fell within the scope of the MIBCO.

[21] The primary ground for the review of the award raised by the respondent entities and the MIBCO was that the commissioner committed a material error of law by regarding the 1962 determination as binding. They contended that this material error of law also constituted a gross irregularity in the proceedings.

[22] In the Labour Court, NUMSA conceded. The Labour Court found that this concession had been correctly made. It held that the 1962 determination was never binding on the commissioner, and that, at most, it could only be of historical interest to explain why the demarcation applicants found themselves located within the scope of the MEIBC. I must at this stage mention that the concession by NUMSA – that the commissioner had been wrong to regard the 1962 determination as binding – is significant and should have a bearing on the issues before this Court.

[23] The Labour Court found that the commissioner's error in respect of the 1962 determination was the primary basis on which he came to the result that he did. Further, it found that the commissioner was required to apply a definition of the scope of the bargaining council to an agreed set of facts. Had the commissioner done so, based on a literal interpretation, he would have come to a conclusion that the definition of "motor industry" in the MIBCO's scope of registration clearly extends to the businesses of the demarcation applicants. This is because it was clear that they conduct

[8] Auto Industrial Group (Pty) Ltd, Auto Industrial Foundry Division, Autocast SA (Pty) Ltd, Autocast SA (Pty) Ltd Aluminium, Borbet SA (Pty) Ltd, Dana Spicer Axle SA (Pty) Ltd, MW Wheels SA (Pty) Ltd, SP Metal Forgings Uitenhage (Pty) Ltd, ZF Lemforder SA (Pty) Ltd, SP Metal Forgings Boksburg (Pty) Ltd, Malben Engineering CC and Torre Automotive (Pty) Ltd.

the business of manufacturing "motor vehicle parts and/or spares and/or accessories and/or components". On this aspect as well, the commissioner's award was found to be clearly wrong and stood to be reviewed and set aside.

[24] The Labour Court, relying on *Mofokeng*,[9] considered whether the obviously wrong decision of the commissioner could nevertheless be reached by a reasonable decision maker. The Court reasoned that the factors to be considered were the general nature of the decision in issue, the range of relevant factors informing the decision, the nature of the competing interests impacted upon by the decision, and whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Put differently, the Labour Court considered whether the decision of the commissioner could nevertheless be found to be reasonable.

[25] For this enquiry, NUMSA contended that there were residual reasons underpinning the award that nevertheless locate it within the band of reasonableness. In particular, reference was made to the bargaining history between the parties and the nature of the process undertaken to produce the end product in issue. NUMSA further submitted that the respondent entities had always accepted that they fell within the MEIBC and saw no contradiction between being engaged in the manufacture of automotive components, while being registered with the MEIBC. The respondent entities' preference to be placed under the MIBCO, it was submitted, was only because of their dissatisfaction with bargaining processes in the MEIBC.

[26] The Labour Court reasoned that the fact that the demarcation of the respondents has historically been included in the scope of the MEIBC was not in itself a sufficient reason to find that they should fall within its scope, even if the 1962 determination is no longer binding. It held that the respondent entities found themselves bargaining alongside employers with whom they shared no common interest, which in itself is not

[9] *Head of Department of Education v Mofokeng* (2015) 36 ILJ 2802 (LAC) (*Mofokeng*).

an allocation of like with like. The Court held that the commissioner was wrong in ignoring these factors.

[27] As regards the finding by the commissioner that the activities of an enterprise are not determined by the end product it manufactures, but by the nature of the enterprise in which the employees and the employer are associated for a common purpose, the Labour Court found this conclusion to disregard the applicable definitions of the scopes of the MEIBC and the MIBCO respectively. The Court held that neither of the two councils' definitions of scope refer to the form of the manufacturing process. The scopes are instead confined specifically to end products like motor vehicle parts, spares, accessories and components, regardless of the mode of manufacture, engineering or otherwise. The reasoning of the commissioner in this regard was found to have contributed to the unreasonableness of the award's result.

[28] The Labour Court summarised its conclusion thus:

> "In summary: the factors disclosed by the evidence indicate that the demarcation applicants fall within the scope of the MIBCO's registration, the history of collective bargaining in the motor and metal industries is based principally on a determination that is some 60 years old and no longer binding, and the definition of scope emphasises the outcome of the manufacturing process rather than the nature of that process. All of these factors, cumulatively considered, indicate that the only reasonable outcome of the proceedings under review is a conclusion that all of the demarcation applicants fall outside of the MEIBC's scope and within the registered scope of the MIBCO.
>
> For the above reasons, the commissioner's decision to place the demarcation applicants within the scope of the MEIBC falls outside of a band of decisions to which a reasonable decision-maker could come on the available evidence. The award accordingly stands to be reviewed and set aside. The essence of NUMSA's cross-review was that the commissioner committed a reviewable irregularity in demarcating six of the component manufacturers into the MIBCO and ought instead to have demarcated them into the MEIBC. This contention is based on the commissioner's process/product finding. For the reasons recorded above, there is no merit in the commissioner's process/product finding. The cross-review stands to be dismissed. Further, the conditional cross-review, to the extent that it relies on the

> submission that even if the commissioner committed a reviewable defect by relying on the 1962 demarcation his conclusion is nonetheless capable of reasonable justification, for the same reasons, stands to be dismissed."[10]

[29] Regarding remedy, it held that:

> "A court will ordinarily substitute the decision of a commissioner where all of the available evidence is before the court and little purpose would be served in a rehearing. The present case falls into that category and the award stands to be substituted by an award to the effect that the applicants be demarcated into the MIBCO."[11]

The Labour Court substituted the award of the commissioner with a ruling that the demarcation applicants fall within the scope of the MIBCO. It dismissed the cross-review and the conditional cross-review and made no order as to costs.

Labour Appeal Court

[30] NUMSA appealed the judgment and order and sought to have the order assigning the respondent entities to the MIBCO set aside and replaced with an order reassigning them to the MEIBC.

[31] The Labour Appeal Court recorded that, at the appeal hearing, it had become common cause that the award had to be set aside because the commissioner had committed a material misdirection by subordinating the enquiry to the 1962 determination, which he believed was binding.[12] He did not evaluate afresh the question of whether the demarcation applicants be subjected to the jurisdiction of the MEIBC. In the Labour Appeal Court's view, the award was correctly set aside on review.[13]

[10] Labour Court judgment above n 3 at paras 58-9.

[11] Id at para 60.

[12] Id at para 7.

[13] Id at para 8.

[32] The Labour Appeal Court held further that the setting aside of the award meant that no part of the award could stand or be severed and revived, because the contamination extended to the whole enquiry.[14] The Labour Appeal Court held that, what was left for the Labour Court to do was either remit the matter for a fresh hearing or make the decision that the commissioner had been required to make. The Court noted that the parties were *ad idem* that the matter should not be remitted.[15] That agreement was found to have been correctly made, because there were no facts in contention and, further, all the factual material necessary to reach a decision that was before the commissioner was before the Labour Court. The Labour Appeal Court concluded that the Labour Court was correct to make a demarcation order itself and not remit the matter to the CCMA.

[33] The question that the Labour Appeal Court considered was whether the Labour Court's decision to assign several of the respondent entities to MIBCO was correct.[16] The Labour Appeal Court found that it was, endorsing the reasoning of the Labour Court. It therefore dismissed the appeal and made no order as to costs.[17]

In this Court

Applicant's submissions

[34] NUMSA is applying for leave to appeal against the judgment of the Labour Appeal Court. If successful, it seeks an order substituting the order of the Labour Appeal Court with an order in terms of which the eighth to twenty-fifth respondents are demarcated as employers within the scope of the MEIBC.

[35] For leave to appeal to be granted, this Court must first be satisfied that it has jurisdiction to entertain the matter. In this regard, NUMSA submits that the issue of

[14] Id.

[15] Id at para 9.

[16] Id at para 60.

[17] Id at para 63.

demarcation is inextricably linked to the constitutional right to engage in collective bargaining, as envisaged in section 23 of the Bill of Rights. Furthermore, this matter is about the interpretation and application of section 62 of the LRA as well as the powers and functions of the Labour Court in demarcation disputes. Accordingly, this dispute concerns a constitutional matter for the purposes of section 167(3)(b)(i) of the Constitution. It also concerns a matter of general public importance within the ambit of section 167(3)(b)(ii) of the Constitution to the extent that the issues raised in the dispute will affect a large number of employees and several thousand employees who are parties to the dispute. The matter, NUMSA submits, therefore engages this Court's jurisdiction.

[36] On 19 August 2020 the Chief Justice issued directions inviting the parties to file written submissions on the following questions:

(a) whether the Labour Court has the power to determine a demarcation dispute in terms of section 62 of the LRA;

(b) whether this dispute should have been remitted to the CCMA for a final decision on demarcation in terms of section 62 of the LRA; and

(c) whether the Labour Court could substitute the decision of the CCMA in this instance.

[37] In response to the directions issued by this Court, NUMSA submits that the Labour Court lacked the power to substitute its own decision for that of the CCMA, because the process dictated by section 62 of the LRA requires the commissioner, before issuing the award, to consult with NEDLAC and consider representations from interested parties. This process, the argument continues, is unsuited to the substitution of the commissioner's award by the Labour Court, which is given a reporting role in the process in terms of section 62(10) of the LRA. NUMSA argues that the policy-laden content of a demarcation determination makes it desirable that this function be exclusively entrusted to a specialist tribunal to the exclusion of Judges. Finally, NUMSA submits that given the multifaceted nature of the process and the

considerations that apply, it can never be said that a demarcation decision is a foregone conclusion.

[38] NUMSA concedes that the dispute concerning the effect of the 1962 determination was resolved during argument before the Labour Court and not resurrected before the Labour Appeal Court. However, NUMSA further contends that the outcome reached by the commissioner in relation to the respondent entities was correct and reasonable, and that he could and should have reached the same conclusion even without reliance on the 1962 demarcation. Regarding the merits, NUMSA repeats the same arguments presented in the courts a quo.

Respondents' submissions

[39] The respondents concede that the matter falls within this Court's jurisdiction. However, they contend that leave to appeal be refused, alternatively, if leave is granted the appeal should be dismissed. In response to the directions issued by this Court, the respondents submit that the Labour Court's power to determine demarcation disputes is sourced from section 145(4) and not section 62 of the LRA. In this case, the fact that the CCMA award was subject to review in terms of section 145 of the LRA is what gave rise to the Labour Court's power to determine the matter.

[40] The respondents submit that section 62 "does not provide a basis to curtail" the powers of the Labour Court under section 145(4) as it is not concerned with the setting aside of a demarcation award. Section 62 concerns the process to follow before and after a demarcation award has been issued.

Jurisdiction and leave to appeal

[41] This matter engages this Court's jurisdiction insofar as it pertains to the interpretation of the LRA's provisions, which ordinarily raises a constitutional issue.[18]

[18] *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at para 14.

The concession by the respondents in this regard is well made. The LRA is designed to give effect to section 23 of the Constitution, as the constitutional right to fair labour practices is implicated.[19] Further, at the heart of this dispute is the proper interpretation of section 62 of the LRA insofar as the power of the Labour Court to review and substitute demarcation awards issued by commissioners of the CCMA is concerned. This Court's ruling will no doubt have an impact on the rights of employees, unions and employers' organisations engaged in demarcation disputes. The issues which arise in this matter, therefore, transcend the narrow interests of the parties involved and have a broader public impact.

[42] The next consideration, having found that this Court does have jurisdiction to entertain the matter, is whether leave to appeal should be granted. In this regard, the enquiry is whether it is in the interests of justice for this Court to entertain the appeal, which requires a consideration of, among other things, whether the application has prospects of success. To resolve this, it is necessary to traverse the merits of the application, which I proceed to do. I am, in any case, of the view that it is in the interests of justice that leave to appeal be granted.

The issues

[43] The issues that arise for determination are:

(a) whether the Labour Court has the authority to determine demarcation disputes;

(b) whether the matter should be remitted to the CCMA or whether the Labour Court could substitute its decision for that of the commissioner; and

(c) whether on the merits, the judgment of the Labour Appeal Court can be faulted.

[19] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) at para 50.

Does the Labour Court have the authority to determine demarcation disputes?

[44] In answering this question, it is necessary to first set out the statutory framework regarding demarcation disputes. The starting point is section 29(8) of the LRA, which deals with the initial stage of demarcation. It empowers NEDLAC to demarcate the appropriate sector over which a bargaining council will exercise jurisdiction within 90 days of receiving the application and the necessary documents from the registrar. Should NEDLAC fail to demarcate the jurisdiction of a bargaining council as required, the Minister responsible for that portfolio must then demarcate the appropriate area and advise the registrar accordingly.[20] In terms of section 29(10), NEDLAC or the Minister must, in determining the appropriateness of the sector and area for demarcation, seek to give effect to the primary objects of the LRA.

[45] Demarcation disputes between sectors and their areas of operation are dealt with in terms of section 62 of the LRA.[21] Section 62(1) makes it clear that any trade union,

[20] Section 29(9) of the LRA.

[21] Section 62 of the LRA provides:

"Disputes about demarcation between sectors and areas

(1) Any registered trade union, employer, employee, registered employers' organisation or council that has a direct or indirect interest in the application contemplated in this section may apply to the Commission in the prescribed form and manner for a determination as to—

(a) whether any employee, employer, class of employees or class of employers, is or was employed or engaged in a sector or area;

(b) whether any provision in any arbitration award, collective agreement or wage determination made in terms of the Wage Act is or was binding on any employee, employer, class of employees or class of employers.

(2) If two or more councils settle a dispute about a question contemplated in subsection (1)(a) or (b), the councils must inform the Minister of the provisions of their agreement and the Minister may publish a notice in the Government Gazette stating the particulars of the agreement.

(3) In any proceedings in terms of this Act before the Labour Court, if a question contemplated in subsection (1)(a) or (b) is raised, the Labour Court must adjourn those proceedings and refer the question to the Commission for determination if the Court is satisfied that—

(a) the question raised—

(i) has not previously been determined by arbitration in terms of this section; and

(ii) is not the subject of an agreement in terms of subsection (2); and

(b) the determination of the question raised is necessary for the purposes of the proceedings.

employer, employee, registered employers' organisation or a council with direct or indirect interest, may apply to the CCMA for the determination of the dispute. Section 62 provides for two types of disputes. First, which is similar to the one in *casu*, is whether any employee, employer, class of employees or class of employers is or was employed or engaged in a particular sector or area.[22] Second, is whether any provision in any arbitration award, collective agreement or wage determination made in terms of

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(3A) In any proceedings before an arbitrator about the interpretation or application of a collective agreement, if a question contemplated in subsection (1)(a) or (b) is raised, the arbitrator must adjourn those proceedings and refer the question to the Commission if the arbitrator is satisfied that—

(a) the question raised—

(i) has not previously been determined by arbitration in terms of this section; and

(ii) is not the subject of an agreement in terms of subsection (2); and

(b) the determination of the question raised is necessary for the purposes of the proceedings.

(4) When the Commission receives an application in terms of subsection (1) or a referral in terms of subsection (3), it must appoint a commissioner to hear the application or determine the question, and the provisions of section 138 apply, read with the changes required by the context.

(5) In any proceedings in terms of this Act before a commissioner, if a question contemplated in subsection (1)(a) or (b) is raised, the commissioner must adjourn the proceedings and consult the director, if the commissioner is satisfied that—

(a) the question raised—

(i) has not previously been determined by arbitration in terms of this section; and

(ii) is not the subject of an agreement in terms of subsection (2); and

(b) the determination of the question raised is necessary for the purposes of the proceedings.

(6) The director must either order the commissioner concerned to determine the question or appoint another commissioner to do so, and the provisions of section 138 apply, read with the changes required by the context.

(7) If the Commission believes that the question is of substantial importance, the Commission must publish a notice in the Government Gazette stating the particulars of the application or referral and stating the period within which written representations may be made and the address to which they must be directed.

(8) If a notice contemplated in subsection (7) has been published, the commissioner may not commence the arbitration until the period stated in the notice has expired.

(9) Before making an award, the commissioner must consider any written representations that are made, and must consult NEDLAC.

(10) The commissioner must send the award, together with brief reasons, to the Labour Court and to the Commission.

(11) If the Commission believes that the nature of the award is substantially important, it may publish notice of the award in the Government Gazette.

(12) The registrar must amend the certificate of registration of a council in so far as is necessary in light of the award."

[22] Section 62(1)(a) of the LRA.

the Wage Act[23] is or was binding on any employee, employer, class of employees or class of employers.[24]

[46] Two or more councils, which are parties to a dispute, may settle their dispute, in which event the councils must inform the Minister of the relevant provisions of the agreement. The Minister may publish the terms of the agreement by a notice in the Government Gazette.[25]

[47] The prescribed process for the resolution of demarcation disputes between parties is the one provided in section 138 of the LRA, which deals with arbitrations in general. Section 138 lays down the basic procedure common to all arbitrations conducted under the LRA. The arbitrator is granted the overriding discretion to decide the form of the proceedings.[26] He or she may allow the leading of evidence, cross-examination, or give directions, as he or she deems necessary.[27] However, the arbitration proceedings must be adapted to changes required by the context in demarcation disputes.

[48] Section 62 makes it plain that all issues relating to demarcation disputes which are not settled by the councils or which arise in the dispute resolution processes conducted under the auspices of the LRA, must be dealt with as follows. Firstly, if in any proceedings before the Labour Court a question relating to a demarcation dispute arises, and the determination of the question raised is necessary for the purposes of those Labour Court proceedings, the Labour Court is obliged to adjourn those proceedings and refer that question to the CCMA for determination (provided that the dispute has not previously been determined by arbitration).[28] The referral envisaged here makes it

[23] 5 of 1957.

[24] Section 62(1)(b) of the LRA.

[25] Section 62(2) of the LRA.

[26] Section 138(1) of the LRA.

[27] Section 138(2) of the LRA.

[28] Section 62(3) of the LRA.

clear that a demarcation dispute should be determined independently and not within the context of other dispute resolution proceedings. This requirement makes sense because demarcation issues are not limited to the narrow interests of the parties. Other parties with an interest in the determination must be given an opportunity to participate in the demarcation proceedings.

[49] The second instance is where a question relating to a demarcation dispute arises in the context of arbitration proceedings about the interpretation or application of a collective agreement.[29] The commissioner or the arbitrator must adjourn the proceedings and refer the demarcation dispute to the CCMA for determination. The CCMA must then appoint a commissioner to hear the application or determine the question.[30] The third instance is where a demarcation issue arises in any proceedings in terms of the LRA, before a commissioner. If the commissioner is satisfied that the question raised has not previously been determined by arbitration in terms of section 62 and is not the subject of a settlement agreement between the councils, the commissioner must adjourn the proceedings and consult the Director of the CCMA. Once consulted, the director must either "order" the commissioner concerned to determine the question or appoint another commissioner to do so.[31] The same justifications noted above in relation to proceedings in the Labour Court are applicable.[32]

[50] The provisions of section 62 are couched in peremptory terms. Commissioners are obliged to conduct arbitration proceedings once a dispute is referred to them.[33] Disputes about demarcation between sectors and areas must first go through arbitration under the auspices of the CCMA.[34]

[29] Section 62(3A) of the LRA.

[30] Section 62(4) of the LRA.

[31] Section 62(5) of the LRA.

[32] I refer to these in [48].

[33] Section 62(4) of the LRA.

[34] Sections 62(3), 62(3A) and 62(5) of the LRA.

[51] In terms of section 62(7), if the CCMA believes that the question to be determined is of substantial importance, it is obliged to publish a notice in the Government Gazette stating the particulars of the application or referral and calling for written representations within a stipulated period.[35] The commissioner may not commence the arbitration proceedings until the period stipulated in the notice has expired.[36] The prescribed publication presupposes that there might be other parties, aside from the disputants, who may have an interest in the matter or be affected by the outcome. Their views could be of assistance to the demarcation process and the invitation for written representations is intended to reduce the unwarranted piecemeal resolution of demarcation disputes.

[52] In *Coin Security*,[37] the Labour Court considered the nature of the arbitration proceedings and the role of the arbitrator in proceedings conducted in terms of section 62 of the LRA. That Court correctly held:

> "The function of a CCMA commissioner in a demarcation dispute is a classic case of the Legislature entrusting a functionary with the power to determine what facts are about the making of a decision and the power to determine whether or not they exist. It is fundamental to the effective operation of the Act that the commissioner must be a repository of such power.
>
> . . .
>
> The demarcation process is one entrusted to a specialist tribunal in terms of the provisions of the Act. The demarcation decision is one involving facts, law and policy considerations. In demarcation decisions, there will, more often than not, be no one absolutely correct judgment. Particularly in decisions of this sort, and given the provisions of the Act, there must of necessity be a wide range of approaches and outcomes that would be in accordance with the behests of the Act. Due deference should therefore be given to the role and functions and resultant decisions of the CCMA in achieving the objects of the Act. This approach will not only be consistent with

[35] Section 62(7) of the LRA.

[36] Section 62(8) of the LRA.

[37] *Coin Security (Pty) Limited v Commission for Conciliation Mediation and Arbitration* (2005) 26 ILJ 849 (LC) (*Coin Security*).

> these principles, but also consistent with the need for the Act to be administered effectively."[38]

[53] It is significant that, before making an award, the commissioner must consider written representations, if any, and must consult NEDLAC.[39] Consulting NEDLAC is a peremptory requirement. This requirement distinguishes demarcation arbitrations from conventional arbitrations contemplated in the LRA. Written representations referred to in this subsection are those that were called for from interested parties through the medium of a notice in the Government Gazette.[40]

[54] The question that arises is what the consultation envisaged in section 62(9) of the LRA entails and at what stage in the proceedings the commissioner must consult NEDLAC. These questions were considered by the Labour Appeal Court in *SA Municipal Workers Union* where that Court correctly held:

> "As regards the consultation with NEDLAC, section 62(9) does not define consultation for these purposes nor does it prescribe any formalities or stipulate at what stage the commissioner must consult NEDLAC, other than it must, axiomatically, be before 'making an award'. No indication is given in the Record of the usual practice followed in consulting NEDLAC. Notably, the duty imposed on the commissioner is not to invite NEDLAC to participate in the hearing, which, it is plain from the text of the section, is a distinct happening. Thus, there is no contemplation apparent from the text of the section that there would be any interaction between the immediate disputants and NEDLAC.
>
> What 'consultation' means in this section will not usefully be divined by recourse to dictionaries or to other judicial pronouncements on other enactments where that word is used. The word must bear a meaning that is context-specific and functional to the objective of section 62. The intrinsic notion of 'consultation' embraces a solicitation about a contemplated course of action or decision. In this section it contemplates NEDLAC, the decision-maker which initially demarcated the sector, furnishing the

[38] Id at paras 43 and 63.

[39] Section 62(9) of the LRA.

[40] Section 62(7) of the LRA.

> commissioner with its views about a decision to be taken by him. Accordingly, it would seem wholly appropriate that the timing of this peremptory consultation be the moment when a *prima facie* view can be expressed by the commissioner and comment can be solicited about that *prima facie* view. Self-evidently, it cannot be the commissioner's final view because that would render the consultation a sham. Lastly, it bears emphasis that the role of NEDLAC is not to 'approve' an award; the decision, from first to last, is that of the commissioner."[41]

[55] The next statutory step to be undertaken by the commissioner is to send the final award with brief reasons to the Labour Court and to the Commission.[42] On receipt of the award, the Labour Court is able to resume the proceedings adjourned under section 62(3) or continue them without interruption.

[56] The CCMA is required to publish the award in the Government Gazette if it believes that the award is substantially important.[43] To conclude the dispute resolution process, the registrar must amend the certificate of registration of the council to conform to the award.[44]

[57] Having set out the dispute resolution process, I now deal with the power of the Labour Court to review a demarcation award. The power of the Labour Court to review demarcation arbitration awards is sourced from section 158(1)(g) of the LRA, which provides that the Labour Court may "subject to section 145, review the performance or purported performance of any function provided for in [the LRA] on any grounds that are permissible in law".[45]

[58] Section 145(1) of the LRA sets out the procedure to be followed in reviewing arbitration awards. It provides that any party to a dispute who alleges a defect in any

[41] *SA Municipal Workers Union v Syntell (Pty) Ltd* [2014] ZALAC 18; (2014) 35 ILJ 3059 (LAC) at paras 26-7.

[42] Section 62(10) of the LRA.

[43] Section 62(11) of the LRA.

[44] Section 62(12) of the LRA.

[45] Section 158(1)(g) of the LRA.

arbitration proceedings of the CCMA may apply to the Labour Court for an order setting aside the arbitration award. This section is framed in general terms and does not limit the type or nature of the awards that may be reviewed in terms of the LRA. Therefore, the Labour Court's oversight role over arbitration awards of the CCMA includes demarcation arbitration awards. The grounds of review are the same for all awards.

Substitution or remittal

[59] The next question is what powers the Labour Court has in relation to demarcation awards. This question must be understood within the context that all the parties agreed that the award was defective and had to be set aside. The issue, then, is whether the matter should be remitted to the CCMA or whether the Labour Court could substitute its decision for that of the commissioner.

[60] It is notable that NUMSA conducted its case in the Labour Court and the Labour Appeal Court on the basis that those Courts should not remit the matter to the CCMA, but rather should decide the merits of the demarcation dispute themselves. This approach implied that NUMSA accepted that the Labour Court had the power to substitute the award of the commissioner. It was also not one of the grounds upon which NUMSA challenged the judgment of the Labour Appeal Court. In light of the view I take of this matter, this was the correct approach to adopt. However, NUMSA's position changed when it responded to the questions raised in the directions issued by this Court.

[61] To recapitulate, the thrust of NUMSA's submission that the Labour Court lacks the power to substitute the award of the commissioner is, firstly, that since section 62 requires the commissioner to engage in a consultation process with NEDLAC, and to consider representations from interested parties, the process is unsuited to substitution. Secondly, NUMSA contends that the policy-laden content of a demarcation determination makes it desirable that this function be exclusively entrusted to a specialist tribunal which is well versed in the conditions which prevail in the sector and area to be demarcated. NUMSA submits that, given the multi-faceted nature of the

process and the considerations that apply, it can never be said that a demarcation decision is a "foregone conclusion". NUMSA relies on these submissions to argue that this matter should have been remitted to the CCMA. In addition, NUMSA submits that the courts below had before them only the juxtaposed viewpoints of two interest groups. NUMSA further submits that the Labour Court should not have substituted the commissioner's award because NEDLAC was not joined in the dispute and the Court only relied on the letter penned by the relevant standing committee. Finally, NUMSA submits that because proper expert evidence might need to be canvassed, the matter should be remitted.

[62] Section 145(4)(a) provides that if an arbitration award is set aside the Labour Court may determine the dispute in the manner it considers appropriate. That expressly gives the Labour Court wide powers that include substituting its decision for that of a CCMA commissioner.[46] There is no specific or implied exception or exemption in section 145(4) for demarcation awards that limit the Labour Court's powers in respect of such awards. Legal scholars support this interpretation.[47]

[63] Section 62 does not curtail the Labour Court's powers under the LRA. The procedure set out in section 62 has no bearing on the issue whether the Labour Court can substitute a demarcation award. The fact that the CCMA must submit a copy of the award to the Labour Court cannot reasonably be interpreted to suggest that the Legislature envisaged that the Labour Court could never substitute a demarcation award. As indicated, section 62(10) merely provides a reporting mechanism to the Labour Court. Since the CCMA is required to publish an award that it believes to be substantially important, and since the registrar is required to amend the certificate of registration of a bargaining council in accordance with the award, the same procedure

[46] In *Sajid v Mahomed N.O.* (2000) 21 ILJ 1204 (LC) at para 89, the Court held that the terms of section 145(4)(a) "give the court the widest possible powers necessary for it to determine a dispute in whatever manner the court 'considers appropriate'". See *Palluci Home Depot (Pty) Ltd v Herskowitz* [2014] ZALAC 81; (2015) 36 ILJ 1511 (LAC) at para 58 where the need for expeditious resolution was emphasised as an important consideration in favour of substitution. Also see *Boxer Superstores (Pty) Ltd v Zuma* [2008] ZALAC 7; (2008) 29 ILJ 2680 (LAC) at para 10.

[47] Grogan *Workplace Law* 13 ed (Juta & Co Ltd, Cape Town 2014) at 448.

should be available where the Labour Court has substituted a demarcation award. It is the outcome of the demarcation dispute that matters. It should not matter whether the ultimate decision is made by the commissioner or by a court in review proceedings for the award to be published and the certificates of registration to be amended. These are merely administrative procedures that need to be followed. They have no bearing on the substance of the demarcation decision.

[64] By referring to "a policy-laden process", NUMSA mainly argues that unlike CCMA commissioners, Labour Court Judges are not skilled or experienced in taking policy-laden, polycentric decisions, and that Judges politicise their role by taking policy-laden decisions, such as those in demarcation disputes. By this contention, NUMSA fails to recognise that section 153(6)(b) of the LRA decrees that Labour Court Judges must be people with knowledge, experience and expertise in labour law. Further, NEDLAC plays a role in the selection process of Judges of the Labour Court by advising the Judicial Service Commission.[48] This Court in *NEHAWU* held that:

> "The Labour Appeal Court is a specialised court which functions in a specialised area of law. The Labour Appeal Court and the Labour Court were specifically established by Parliament in order to administer the LRA. They are charged with the responsibility for overseeing the ongoing interpretation and application of the LRA and development of labour relations policy and precedent. Through their skills and experience, judges of the Labour Appeal Court and the Labour Court accumulate the expertise which enables them to resolve labour disputes speedily."[49]

[65] Judges are often required to adjudicate matters concerning intricate policy issues and legal questions with political implications. They are well trained to decide cases in accordance with the Constitution and the law. NUMSA's submission in this regard suggests that commissioners are susceptible to have their role politicised. That could not have been the intention of the Legislature in enacting section 62 of the LRA.

[48] Section 153(4) of the LRA.

[49] *NEHAWU* above n 18 at para 30. See also *Chirwa v Transnet Ltd* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at para 105.

[66] There is therefore no merit in NUMSA's contention that the Labour Court lacked the power to substitute the CCMA's decision for that of its own. Substitution, by definition, entails a court taking a decision that has been assigned to a specific functionary. Courts describe substitution as "tak[ing] the decision for the administrative decision-maker" and the substituting court as "assum[ing] an administrative decision-making function".[50] The essence of substitution is therefore the taking of a decision that in the ordinary course would be taken by a different decision-maker. Although section 62 clearly contemplates that demarcation is firmly within the rarified realm of the CCMA and specialist commissioners, it does not follow that substitution is not competent.

[67] Having found that the Labour Court has the power to substitute the decision of a commissioner in a demarcation award, the question remains: in which circumstances should such power be exercised? Whilst the Labour Court enjoys a wide discretion to determine the dispute in the manner it considers appropriate, this does not mean that it should readily substitute its decision for that of the commissioner. Concerns relating to the doctrine of separation of powers are acute, because of the danger of courts usurping powers assigned to a different sphere of government,[51] and the Labour Court should exercise a measure of judicial deference, and only substitute decisions in exceptional circumstances. The Labour Court is restricted to the grounds of review in section 145 of the LRA and the remedies permitted within its powers in section 158 of the LRA. However, judicial deference should not be interpreted to mean that the Labour Court does not have the power to substitute demarcation arbitration awards.

[68] This Court had occasion to consider the test for exceptional circumstances in *Trencon,*[52] where it held:

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[50] *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape* 2007 (6) SA 442 (Ck) at para 43.

[51] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) at para 95.

[52] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (*Trencon*).

> "To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances."[53]

[69] There is no reason why the Labour Court should be regarded as incompetent to substitute arbitration awards in demarcation disputes. There are guidelines in place for courts to consider before they exercise the discretion to substitute or not. Moreover, courts will only substitute in exceptional circumstances. Because the demarcation decision is so polycentric and policy laden, substitution will rarely be appropriate and courts will rarely be in as good a position as the commissioner to take a demarcation decision.

[70] In this matter, the Labour Court had before it a complete record consisting of facts that were common cause.[54] The commissioner had complied with all the statutory requirements expected of him. He called for written submissions after evidence was presented. To the discontent of the parties, he arranged another session for parties to make oral submissions. After preparing the preliminary award, the commissioner duly consulted NEDLAC on at least two occasions. A formal meeting with the standing committee was held, where the preliminary award was discussed. The commissioner was allowed time to consider revising the award having regard to the concerns raised by NEDLAC. He produced a revised award that became the subject of review

[53] Id at para 47.

[54] Labour Court judgment above n 3 at paras 22-4.

proceedings. The fact that the commissioner did not produce an award that incorporated all the concerns of NEDLAC does not render the process invalid. It is in the discretion of the commissioner to accept or reject NEDLAC's comments. Such discretion should, however, be exercised judicially. In any case, the order of substitution addresses NEDLAC's concerns, and is just and equitable under the circumstances. While CCMA proceedings are not court proceedings, commissioners also fulfil adjudicative functions. Since there has been adequate consultation with NEDLAC, there is no need to start the process afresh when the award is set aside.

[71] In this matter, the procedure prescribed in section 62 was followed. It is not NUMSA's case that any of the statutory requirements were not followed. It, in fact, supports the conclusion reached by the commissioner as a reasonable decision despite the error of law he made. The Labour Court, having considered the material before it, found that the decision was a foregone conclusion. There was only one reasonable outcome to be reached on the material on record, namely that the respondent entities fell to be demarcated under the MIBCO. This conclusion cannot be assailed. Moreover, given that the matter had already been delayed, the prospect of further delay weighed in favour of substitution. In *NEHAWU* this Court warned that:

> "By their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organise their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily by experts appointed for that purpose. This Court will therefore be slow to hear appeals from the Labour Appeal Court unless they raise important issues of principle."[55]

The facts in this matter were common cause and, as such, there was no need to present any further expert evidence. NUMSA had the opportunity to present expert evidence in the CCMA and squandered it. To reach a different conclusion would mean that any

[55] *NEHAWU* above n 18 at para 31.

party dissatisfied with the demarcation may request to reopen the case to lead further evidence. There must be finality.

[72] I have had the privilege of reading the dissenting judgment prepared by my colleague, Jafta J. I note that he disagrees with my reasons and finding that the Labour Court has the power, in appropriate cases, to substitute demarcation awards issued by the CCMA. I am, unfortunately, not persuaded that section 62 must be interpreted in a way that limits the Labour Court's power as my colleague finds. I have already made the point that the power of the Labour Court to substitute demarcation arbitration awards is not derived from section 62, which deals with arbitration proceedings. The power is derived from the express provisions of section 145(4), read with section 158 of the LRA. The express provisions distinguish arbitration proceedings conducted in terms of the LRA from the cases my colleague Jafta J refers to. As already pointed out, the Labour Court is given supervisory powers over the activities of the CCMA.

[73] I agree that the default position when a demarcation award is set aside on review is to remit. However, that does not mean that the Labour Court does not have the power to substitute in appropriate cases. Such an exclusion would defeat the purpose of the LRA and the need for expeditious and effective resolution of labour disputes. The other points on which my colleague Jafta J disagrees with me are fully addressed above and I need not repeat them.

Merits

[74] The Labour Appeal Court correctly approached the appeal before it on the basis of whether the Labour Court's judgment regarding assignment of the respondent entities to MIBCO was the correct one. Having considered the evidence, it concluded that:[56]

[56] Labour Appeal Court judgment above n 2 at para 63.

> "It is appropriate to examine the profile and structure of motor manufacture as it presents in 2017 and to give weight to the transformation of that industry over the past half century.
>
> The concept of value chain and the location of a business in an integrated process of manufacture is a legitimate tool of analysis.
>
> An evaluation premised on end-product rather than work process was appropriate in the given circumstances.
>
> A textual evaluation of definitions of the engineering realm and the motor manufacturing realm yields a result that demonstrates a functional overlap and the need for a policy decision to draw the line of demarcation on the facts, in favour of the jurisdiction of MIBCO."

[75] The above findings of the Labour Appeal Court are consistent with the findings of the Labour Court. They address the concerns of NEDLAC, which is given an important role in the demarcation process. Interestingly, the commissioner recognised that the definition of the scope of the MEIBC excluded the respondent entities from its scope of operation. His mistaken decision that he was bound by the 1962 determination is the one that led him to make his award. For these reasons, the judgment of the Labour Appeal Court cannot be assailed. The appeal falls to be dismissed.

Costs

[76] What remains is the issue of costs. Sections 162 and 179 of the LRA enjoin the Labour Court and Labour Appeal Court to make orders for the payment of costs according to the requirements of the law and fairness. Factors that may be taken into consideration when deciding whether or not an order for the payment of costs is appropriate are, firstly, whether the matter should have been referred to arbitration in terms of the LRA and, if so, the extra costs incurred in referring the matter to court instead. Secondly, the conduct of the parties in defending the matter before the court, and the conduct of the parties during the proceedings before the court, can also be considered. None of these factors are applicable in this case.

[77] In this matter it would be in accordance with the requirements of the law and fairness that no order as to costs should be made.[57] In addition, the parties have an ongoing relationship, a further factor that militates against a costs order.

Order

[78] In the result, the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.

JAFTA J

[79] I have had the pleasure of reading the judgment of my colleague Tlaletsi AJ (first judgment). I agree that leave to appeal should be granted but disagree that the appeal should be dismissed. In my view the appeal ought to succeed partially to the extent that the matter should be remitted to the CCMA. In other words, I disagree that the Labour Court has competently exercised the power of substitution.

[80] At the heart of this matter is the change to a demarcation that placed a number of companies involved in the manufacturing of motor vehicle components under the jurisdiction of the MEIBC. These companies sought to be redemarcated and placed under the jurisdiction of the MIBCO. Both MEIBC and MIBCO are registered bargaining councils.

[81] But what is not clear from the papers is whose decision resulted in the relevant companies being placed under MEIBC. Section 29 of the LRA merely tells us that the

[57] *Zungu v Premier of the Province of KwaZulu*-Natal [2018] ZACC 1; (2018) 39 ILJ 523 (CC); 2018 (6) BCLR 686 (CC) at para 24. Also see *Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin N.O.* [2007] ZALAC 34; (2008) 29 ILJ 1707 (LAC) at para 19.

original demarcation is done by NEDLAC[58] or the Minister of Labour,[59] in the event that NEDLAC fails to do the demarcation within 90 days of receiving the application for demarcation. It is also not clear from the present record when that decision was taken and for what reasons. Nor is it clear for how long such decision should remain in force before it may be changed.

Scheme of section 62

[82] What is evident though from the LRA is that any party with a direct or indirect interest in the redemarcation of employees or employers may apply, in the prescribed form and manner, to the CCMA.[60] Upon receipt of such application, the CCMA must appoint a commissioner specially to hear and determine the application.[61] The appointed commissioner is obliged to conduct the inquiry in accordance with the

[58] Section 29(8) of the LRA provides:

> "NEDLAC, within 90 days of receiving the documents from the registrar, must—
>
> (a) consider the appropriateness of the sector and area in respect of which the application is made;
>
> (b) demarcate the appropriate sector and area in respect of which the bargaining council should be registered; and
>
> (c) report to the registrar in writing."

[59] Section 29(9) of the LRA provides:

> "If NEDLAC fails to agree on a demarcation as required in subsection (8)(b), the Minister must demarcate the appropriate sector and area and advise the registrar."

[60] Section 62(1) of the LRA provides:

> "Any registered trade union, employer, employee, registered employers' organisation or council that has a direct or indirect interest in the application contemplated in this section may apply to the Commission in the prescribed form and manner for a determination as to—
>
> (a) whether any employee, employer, class of employees or class of employers, is or was employed or engaged in a sector or area;
>
> (b) whether any provision in any arbitration award, collective agreement or wage determination made in terms of the Wage Act is or was binding on any employee, employer, class of employees or class of employers."

[61] Section 62(4) of the LRA provides:

> "When the Commission receives an application in terms of subsection (1) or a referral in terms of subsection (3), it must appoint a commissioner to hear the application or determine the question, and the provisions of section 138 apply, read with the changes required by the context."

provisions of section 138 of the LRA, which must be applied with changes necessitated by context.

[83] If the CCMA is of the opinion that the demarcation in question is of substantial importance, the CCMA must publish a notice in the Government Gazette, stating the particulars of the application and inviting interested parties to submit written representations.[62] Section 62(7) confers upon interested parties, the right of hearing before the application is determined. The notice concerned must state the period within which those representations are to be lodged and the place where they should be filed. If a notice is published, the appointed commissioner may not commence the hearing until the period for filing written submissions has expired.[63] The commissioner is obliged to consider the submissions made and consult NEDLAC before reaching a decision on the matter.[64] Upon making his or her award, the commissioner must submit it together with brief reasons to the Labour Court and to the CCMA.[65]

[84] The reason for this is two-fold. First, the award is submitted to the Labour Court for record-keeping. If a similar dispute arises in the future, the Labour Court would have recourse to the award and resolve it in accordance with what the award directs. Second, it may appear from the award and the reasons furnished that it is of substantial importance. If the CCMA believes that the nature of the award renders it substantially

[62] Section 62(7) of the LRA provides:

> "If the Commission believes that the question is of substantial importance, the Commission must publish a notice in the Government Gazette stating the particulars of the application or referral and stating the period within which written representations may be made and the address to which they must be directed."

[63] Section 62(8) of the LRA provides:

> "If a notice contemplated in subsection (7) has been published, the commissioner may not commence the arbitration until the period stated in the notice has expired."

[64] Section 62(9) of the LRA provides:

> "Before making an award, the commissioner must consider any written representations that are made, and must consult NEDLAC."

[65] Section 62(10) of the LRA provides:

> "The commissioner must send the award, together with brief reasons, to the Labour Court and to the Commission."

important, it may publish it in the Government Gazette so that it can be widely accessed by interested parties.[66] Following all these steps, the registrar must amend the registration certificate of the relevant bargaining council.[67] This is the scheme of section 62 which governed the change in demarcation in this matter.

[85] Significantly, the section does not set out the circumstances under which an existing demarcation may be amended. However, it is evident that the director of the CCMA plays a vital role in the process. For example, it is the director who reaches the opinion on whether the matter is of substantial importance that warrants a pre-decision hearing of all interested parties and gives the necessary notice. More importantly, it is the director who chooses the commissioner to decide the matter, presumably on the bases of the commissioner's experience and expertise.

[86] It is self-evident from the scheme of section 62 that the commissioner to be appointed must have certain attributes. This is apparent from two provisions of section 62. The first one is section 62(3A) which obliges an arbitrator to adjourn proceedings if the question of demarcation arises during proceedings on the interpretation of a collective agreement and to refer that question to the director.[68] The

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[66] Section 62(11) of the LRA provides:

> "If the Commission believes that the nature of the award is substantially important, it may publish notice of the award in the Government Gazette."

[67] Section 62(12) of the LRA provides:

> "The *registrar* must amend the certificate of registration of a council in so far as is necessary in light of the award."

[68] Section 62(3A) of the LRA provides:

> "In any proceedings before an arbitrator about the interpretation or application of a collective agreement, if a question contemplated in subsection (1) (a) or (b) is raised, the arbitrator must adjourn those proceedings and refer the question to the Commission if the arbitrator is satisfied that—
>
> (a) the question raised—
>
> (i) has not previously been determined by arbitration in terms of this section; and
>
> (ii) is not the subject of an agreement in terms of subsection (2); and
>
> (b) the determination of the question raised is necessary for the purposes of the proceedings."

same must be done if at any proceedings before a commissioner, the issue of demarcation is raised. The proceedings should be adjourned and the commissioner concerned should consult the director on the matter.[69] In that event, the director is bound to direct that the commissioner concerned should determine the issue or appoint another commissioner to do so.[70]

[87] This clearly reveals that not even commissioners of the CCMA are empowered to automatically determine the issue of demarcation if it arises in proceedings before them. They may not do so even if they have the necessary experience and skill. If they have those attributes, the director may order them to decide the issue. But they cannot do so without being ordered by the director in terms of section 62(6). The order of appointment by the director is a jurisdictional fact for the exercise of the power to determine a demarcation issue. Without it, no valid demarcation may occur.[71] Evidently section 62 leaves the identification of a commissioner to determine the issue to the discretion of the director and the director's choice must precede every demarcation.

[88] This is so because even where the issue of demarcation arises in proceedings before the Labour Court, that Court is obliged to adjourn its proceedings and refer the

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[69] Section 62(5) of the LRA provides:

> "In any proceedings in terms of this Act before a commissioner, if a question contemplated in subsection (1)(a) or (b) is raised, the commissioner must adjourn the proceedings and consult the director, if the commissioner is satisfied that—
>
> (a) the question raised—
>
> (i) has not previously been determined by arbitration in terms of this section; and
>
> (ii) is not the subject of an agreement in terms of subsection (2); and
>
> (b) the determination of the question raised is necessary for the purposes of the proceedings."

[70] Section 62(6) of the LRA provides:

> "The director must either order the commissioner concerned to determine the question or appoint another commissioner to do so, and the provisions of section 138 apply, read with the changes required by the context."

[71] *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) and *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C).

issue on demarcation to the CCMA.[72] In terms of section 62(3), upon receipt of the referral the director must appoint a commissioner to decide the issue. This is a clear indication that the Labour Court does not have authority to determine a demarcation dispute. If it had the power, section 62(3) would not oblige it to adjourn its proceedings and refer the demarcation issue to the CCMA.

[89] In addition to the point on the requisite jurisdictional fact, the language of section 62 indicates that the power to determine demarcation disputes was exclusively conferred on the CCMA's commissioners. Where the language of the empowering statute suggests that Parliament had deliberately chosen a particular functionary to exercise power, a court may not substitute the decision of that functionary with its own. To do so would mean that the common law on substitution trumps the statute.

[90] A leading decision on this issue is *Jooste Lithium Myne*, a decision of the Appellate Division in 1955. In that matter the relevant provision stated:

> "[T]he inspector shall have authority to decide any dispute that may arise in regard to the validity of pegging or beaconing of any claim or block of claims."[73]

Decisions of the inspector were appealable to the Administrator in terms of section 12, which read:

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[72] Section 62(3) of the LRA provides:

> "In any proceedings in terms of this Act before the Labour Court, if a question contemplated in subsection (1) (a) or (b) is raised, the Labour Court must adjourn those proceedings and refer the question to the Commission for determination if the Court is satisfied that—
>
> (a) the question raised—
>
> (i) has not previously been determined by arbitration in terms of this section; and
>
> (ii) is not the subject of an agreement in terms of subsection (2); and
>
> (b) the determination of the question raised is necessary for the purposes of the proceedings."

[73] *Administrator, South West Africa v Jooste Lithium Myne (Edms) Bpk* 1955 (1) SA 557 (A) (*Jooste Lithium Myne*) at 564F-G.

> "(1) Any aggrieved party may appeal to the Administrator against any decision given by the inspector in the execution of his duties within twenty-one days from the date on which such decision is communicated to him. . . The grounds on which an appeal is based must be set out in writing. The Administrator may allow or dismiss such appeal and his decision on the matter shall be final.
>
> (2) Nothing in this section contained shall be deemed to affect any right a party may have at common law to bring any decision of the inspector or the Administrator before a competent court for purposes of review."[74]

[91] In 1953 Mr Fricke pegged and beaconed off a base mineral claim on the farm owned by Jooste Lithium Mines. In the view of this company, Mr Fricke had not complied with the relevant regulations and a dispute arose between them. The matter was referred to the inspector for resolution. Having held an inquiry, the inspector ruled that Mr Fricke had validly pegged his claim. The company appealed to the Administrator who dismissed the appeal. Unhappy with the outcome, the company instituted a review application against the Administrator and sought that the impugned decisions be set aside on, among other grounds, the fact that both the inspector and the Administrator had wrongly interpreted the relevant regulations.

[92] The High Court set aside the Administrator's decision and instead of remitting the matter, the High Court substituted the decision of the Administrator with its own decision. One of the issues on appeal to the Appellate Division was whether the High Court was right to decide the matter itself. Hoexter JA said:

> "It remains to consider the question whether the High Court was right in granting an order declaring that the claim of Fricke was not validly pegged. *Prima facie* the granting of such an order is not a matter for the Court because in terms of sec. 21(3) of the Proclamation it is not the Court which is authorised to decide disputes with regard to the pegging of claims. The decision of such disputes is entrusted in the first instance to the inspector and on appeal to the Administrator."[75]

[74] Id at 564H-565A.

[75] Id at 567G-H.

[93] The learned Judge proceeded to evaluate the High Court's reasoning and pointed out errors in it. First, he ruled that the task of interpreting the relevant regulations was that of the officials and not the High Court which was not permitted to overrule their decisions on the basis of the Court's interpretation of the regulations. Hoexter JA concluded:

> "It seems to me, with respect, that the [High Court] erred in holding that the interpretations of the regulations is a matter for the Court and that the Administrator is bound by the Court's interpretation. In my opinion the Legislature intended that the regulations should be interpreted in the first instance by the inspector and on appeal by the Administrator. It is for the Administrator to decide any legal issues involved in a dispute as to the pegging of a claim, and the most important legal issue is the interpretation of the regulations. It cannot be said that the wrong interpretation of a regulation would prevent the Administrator from fulfilling its statutory function or from considering the matter left to it for decision. On the contrary, in interpreting the regulations the Administrator is actually fulfilling the function assigned to it by the statute, and it follows that the wrong interpretation of a regulation cannot afford any ground for review by the Court."[76]

[94] The Appellate Division reversed the substitution order issued by the High Court and replaced it with an order remitting the matter to the Administrator. There are similarities between that case and the present matter. As it appears from *Coin Security*[77], in a demarcation dispute it is left to the commissioner to determine which factors are relevant and which approach he or she prefers. The process itself involves consideration of facts, law and policy by the commissioner.[78] Here the commissioner preferred the approach of determining the nature of the manufacturing process, for example, the engineering process in determining the dispute, and she was entitled to do so. But the Labour Court opted for determining the nature of the products

[76] Id at 569B-E.

[77] *Coin Security* above n 37.

[78] Id at paras 43 and 63.

manufactured in resolving the demarcation. On the authority of *Jooste Lithium Myne*, this was impermissible and should be set aside.

[95] The principle emanating from *Jooste Lithium Myne* was not overturned in *Trencon*,[79] a decision of this Court that deals with substitution under section 8 of the Promotion of Administrative Justice Act.[80] In *Trencon* this Court addressed the issue relating to the requirements for substitution where substitution was competent. The Court did not address the question whether a court may substitute the decision of an administrative functionary with its own, despite an indication in the empowering provision that Parliament wanted that functionary alone to exercise the power. Accordingly *Trencon* is not on point.

Substitution at common law

[96] The real issue in this matter is whether the Labour Court was correct to substitute the decision of the commissioner on demarcation with its own award. The Labour Court dedicated two sentences only to substitution, out of a judgment of 61 paragraphs. It reasoned:

> "A court will ordinarily substitute the decision of a commissioner where all of the available evidence is before the court and little purpose would be served in a rehearing. The present case falls into that category, and the award stands to be substituted by an award to the effect that the applicants be demarcated into the MIBCO."

[97] What is noticeable in this statement is the incorrect formulation of substitution. In the Labour Court's understanding, where "all the available evidence is before the court and little purpose would be served in a rehearing", the court may substitute the commissioner's decision. Here, the Labour Court clearly applied the wrong test and this is a sufficient ground to interfere with the decision on appeal.

[79] *Trencon* above n 52 at para 33.

[80] 3 of 2000.

[98] The correct standard is that the court will ordinarily remit the matter to the functionary entrusted to exercise the power and only depart from that course under certain defined circumstances. In *Johannesburg City Council* Hiemstra J formulated the principle in these words:

> "1. The ordinary course is to refer back because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary.
>
> 2. The Court will depart from the ordinary course in these circumstances:
>
> (i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by reference back is significant in the context.
>
> (ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again."[81]

[99] This formulation was approved by this Court in *Premier, Mpumalanga* where substitution by the High Court was rejected for not meeting the test.[82] Having cited *Johannesburg City Council*, this Court held:

> "[T]he learned Judge did not consider sufficiently the fact that s 32 of the Act reserves the decision as to what grants should be made to State–aided schools to the second applicant, a duly elected politician, who is a member of the executive council of the province. By definition, therefore, the decision to be made by the second applicant was not a judicial decision but a political decision to be taken in the light of a range of considerations."[83]

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[81] *Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T) at 76E-G.

[82] *Premier, Mpumalanga v Executive Committee of the Association of Governing Bodies of State Aided Schools, Eastern Transvaal* [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at paras 50-1.

[83] Id at para 51.

[100] Similarly here the discretion is entrusted to the commissioner chosen by the CCMA director. He or she takes into account not only the relevant facts and the law but also policy considerations. The decision is not judicial in nature and involves a wide range of considerations which must be weighed and a value judgment ultimately reached. In *Coin Security* the commissioner's power was defined thus:

> "The function of a CCMA commissioner in a demarcation dispute is a classic case of the legislature entrusting a functionary with the power to determine what facts are about the making of a decision and the power to determine whether or not they exist. It is fundamental to the effective operation of the Act that the commissioner must be a repository of such power.
>
> . . .
>
> The demarcation process is one entrusted to a specialist tribunal in terms of the provisions of the Act. The demarcation decision is one involving facts, law and policy considerations. In demarcation decisions, there will, more often than not, be no one absolutely correct judgment. Particularly in decisions of this sort, and given the provisions of the Act, there must of necessity be a wide range of approaches and outcomes that would be in accordance with the behests of the Act. Due deference should therefore be given to the role and functions and resultant decisions of the CCMA in achieving the objects of the Act. This approach will not only be consistent with these principles, but also consistent with the need for the Act to be administered effectively."[84]

[101] This statement is in line with the scheme of section 62 outlined above. In that scheme even the properly qualified commissioner may not arrogate to herself or himself the power to determine a demarcation dispute. It is the director of the CCMA who must appoint her or him to exercise that power. By design, these appointments are done on a case-by-case basis. This means that even if a commissioner had previously been appointed to perform that function, she or he cannot in the future proceed to exercise

[84] *Coin Security* above n 37 at paras 43 and 63.

that power without the director's appointment. Section 62 requires authorisation from the director on each occasion the need arises for demarcation.

[102] Self-evidently the provisions of section 62 are not consistent with the common law principle of substitution. The injunction that the Labour Court must adjourn the proceedings and refer the issue of demarcation to the CCMA plainly indicates that Parliament did not contemplate that the power could be exercised by the Labour Court in the first place. It would be remarkable to hold that once that power was wrongly exercised, the Labour Court assumes the position of exercising that power. In other words, the wrongful exercise of that power by the commissioner may not empower the court to exercise it itself during the adjudication of the review. There is nothing in the text of section 62 which supports this reading of the section.

[103] To hold that the Labour Court may substitute is at variance with the requirements that the director may afford interested parties a hearing before the award is made. It is also not in line with the duty to submit the award with reasons to the Labour Court and the CCMA, to enable the latter to publish it if it is of substantial importance. Nor is the Labour Court under a duty to consider written representations and consult NEDLAC. It bears emphasis that under section 62, the body that consults NEDLAC and considers representations is the same body that makes the award. Therefore, it would be irregular for the consultation to be done by the commissioner but for the power to be exercised by the Labour Court. That cannot constitute compliance with section 62.

[104] The inconsistency between section 62 and the common law must inevitably lead to the conclusion that the common law does not apply. Otherwise it would mean that the common law displaces the statute. It is a well-established principle of our law that if a statute is inconsistent with the common law, the statute takes precedence.

[105] The Labour Appeal Court too applied the wrong test for substitution. That Court held that "all the factual material necessary to reach a decision was before the commissioner and thus also before the Review Court". For that reason the Labour

Appeal Court concluded that the review court was "correct to make a demarcation order itself".[85] This is not the test for substituting a decision of an administrative body with that of the court. Instead, it is the standard for determining whether a matter should be returned to the court of first instance. In the case of a remittal to the court of first instance, the determinative factor is whether all facts necessary for the determination of issues have been placed on record and that what is outstanding is reaching a decision on those issues.

[106] That this is how the Labour Appeal Court approached the matter is plain from this reasoning:

> "The parties are *ad idem* that the matter should not be remitted. This is a correct stance because there are no facts in contention and all the factual material necessary to reach a decision was before the commissioner and thus also before the Review Court. The Review Court was therefore correct to make a demarcation order itself. Plainly, the self-same considerations about the factual material are applicable to the appeal against the Review Court's decision."[86]

[107] Proceeding from the wrong test, the Labour Appeal Court held that the issue it was called upon to decide was whether the substituted decision of the Labour Court was correct. That question demonstrates beyond doubt that the Labour Appeal Court thought it was dealing with the correctness of a judicial decision of the Labour Court, rather than a review of a decision that Court took on behalf of a commissioner. As a result of the error made by the Labour Appeal Court, there was a conflation of a review and an appeal. This Court has reaffirmed the continued distinction between a review and an appeal.[87]

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[85] Labour Appeal Court judgment above n 2 at para 9.

[86] Id.

[87] *Sidumo* above n 19 at para 108 and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 45.

[108] In dismissing the appeal the first judgment does not address the missteps and serious errors in the judgments of the courts below. On the contrary, the first judgment endorses those judgments.[88] I disagree. As shown here those judgments were wrong.

[109] While it is true that the formulation of the common law principle of substitution in *Johannesburg City Council* has changed lately, it still retains its essential elements. Our Courts have routinely refused to substitute the decisions of administrators with their own where it is said that all the information necessary for taking a decision was placed before a court.[89] The mere fact that a court regards itself as qualified to take the decision as the official does not justify usurping that official's powers.

[110] In *Littlewood* the Supreme Court of Appeal formulated the test in these words:

> "It is well established that only exceptionally will a court substitute its own decision for that of an official to whom the decision has been entrusted. It cannot be said in the present case that the proper decision is a foregone conclusion, nor that the Minister has disabled himself from properly making it, nor are there any other grounds for substituting our decision for his. The proper course is to remit the matter for re-consideration by the Minister."[90]

[111] This affirms the point that remittal remains the default position. Put differently, a court must not usurp the power of an administrator where the latter had acted irregularly. As a general principle, a court must remit the matter to the administrator unless there are special circumstances militating against a remittal.[91]

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[88] First judgment at [75].

[89] *Littlewood v Minister of Home Affairs* [2005] ZASCA 10; 2006 (3) SA 474 (SCA) and *Commissioner, Competition Commission v General Council of the Bar of South Africa* [2002] ZASCA 101; 2002 (6) SA 606 (SCA).

[90] Id at para 18.

[91] *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration)* [1998] ZASCA 91; 1999 (1) SA 104 (SCA) at 109.

[112] Here there is no evidence that the commissioner had exhibited bias or incompetence to the extent that it would be unfair to return the matter to her. But even if this were the position, the director of the CCMA could avoid it by appointing a new commissioner.

[113] It cannot also be argued that the end result was a foregone conclusion. It will be recalled that here it was a question of preference between two relevant factors, namely, the production process and "the end-product produced". The commissioner had preferred the former factor whereas the Labour Court opted for the latter. This is how the Labour Court motivated its preference:

> "In summary: the factors disclosed by the evidence indicate that the demarcation applicants fall within the scope of MIBCO's registration, the history of collective bargaining in the motor and metal industries is based principally on a determination that is some 60 years old and no longer binding, and the definition of scope emphasises the outcome of the manufacturing process rather than the nature of that process. All of these factors, cumulatively considered, indicate that the only reasonable outcome of the proceedings under review is a conclusion that all of the demarcation applicants fall outside of the MEIBC's scope and within the registered scope of the MIBCO."[92]

[114] This is not a case where the commissioner had considered an irrelevant factor. The production process was a relevant factor. This much was clear from the judgments of the Labour Court and the Labour Appeal Court. In this regard the latter stated:

> "The rationale evinced in the judgment of Van Niekerk J, in summary, was that (1) it was a necessary dimension of the exercise to interpret the definitional scope of the rivals and apply those descriptions to the common cause descriptions of the nature of the enterprises, (2) the bargaining history under the jurisdiction of MEIBC for several decades, though pertinent was not a weighty factor in addressing the question of the best-fit for those enterprises at the time of the enquiry, (3) an appreciation of the end-product produced by the enterprises was a better tool of analysis in this case, and

[92] Labour Court judgment above n 3 at para 58.

> (4) the value chain concept was legitimate and useful in achieving the aims of the LRA."[93]

[115] We must remember that, as it was pronounced in *Coin Security*, section 62 entrusts the commissioner with the power to determine factors necessary to the inquiry, and the factor preferred by the commissioner may reasonably lead to the retention of the applicant companies under the jurisdiction of MEIBC in which they fell in terms of the previous demarcation. And as was observed in *Coin Security*:

> "The demarcation decision is one involving facts, law and policy considerations. In demarcation decisions, there will, more often than not, be no one absolutely correct judgment."[94]

[116] Therefore, in this matter it cannot be said that the proper decision was a foregone conclusion that justified substitution. Of course the question whether the test for substitution was met would arise only if the common law principle finds application here. I have illustrated that it does not apply.

[117] For all these reasons I would uphold the appeal and remit the matter to the CCMA for a fresh decision by another commissioner. Whilst a period of time has lapsed since the application for demarcation was made, that in and of itself alone cannot justify usurping the commissioner's power. The bigger part of that delay was occasioned by the judicial process. Accordingly the right outcome cannot be displaced by the delay. This Court has ordered reinstatement of workers even where more than five years had lapsed. The fact that there was a delay and the employer, in all likelihood, had replaced them, was not considered to be a bar to reinstatement.[95]

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[93] Labour Appeal Court judgment above n 2 at para 31.

[94] *Coin Security* above n 37 at para 63.

[95] *National Union of Metalworkers of SA on behalf of Fohlisa v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd)* [2017] ZACC 9; (2017) 38 ILJ 1560 (CC); 2017 (7) BCLR 851 (CC) at para 40 and *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38; 2017 (1) SA 549 (CC); [2017] 1 BLLR 8 (CC).

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