elrc
EDUCATION LABOUR RELATIONS COUNCIL

LABOUR BULLETIN

Education Labour Relations Council
in association with the
Labour and Social Security Law Unit of the
Nelson Mandela Metropolitan University

Nelson Mandela Metropolitan University
for tomorrow

In this Issue:

1. FROM THE GENERAL SECRETARY'S DESK

1.1 New Disputes Management

The ELRC wishes to first apologise for delays regarding the non-payment of invoices. We understand that there has been a serious delay and wish to apologise for any inconvenience caused. The Dispute Resolution Services Department ("Department") has been under an ongoing audit and the total restructuring of our Department has also contributed to this delay.

Due to circumstances beyond our control the delay in payment could not be avoided. We did however make every attempt to finalise all outstanding invoices for 2007 by December as we realise the inconvenience it could have caused. If for some reason any panellist has not yet been paid, please do not hesitate to contact the General Secretary (gen.sec@elrc.co.za).

For the Department to expedite the processing of invoices there has to be mutual co-operation between the Department and the panellists. The Department is required to act within the ambits of the Public Finance Management Act as well as the internal departmental policies, of the ELRC, in order to ensure strict accountability and to prevent any abuse and fraudulent activity arising from any claim. Panellists are required to submit invoices according to the requirements of the VAT and Income Tax Act.

If either the Department or the panellists do not comply with the legislative requirements, it prolongs and compromises the process unnecessarily.

Dispute resolution proceedings are supposed to be conducted with a minimal degree of formality and are intended to be "speedy and expeditious" as compared to court proceedings. The ELRC Constitution requires disputes to be resolved within 30 to 45 days depending on the type of dispute. Certain Panellists have not complied with this requirement and have taken it upon themselves to continually postpone the proceedings without consulting the Council. As a result, matters were unnecessarily prolonged and the necessary documentation supporting payment could not be provided.

To avoid such situations the Council has decided to make payment of invoices only on completion of the entire process, being on rendering the award or settlement agreement and the submission of all supporting documentation. (attendance registers, notice of hearing, minutes, reports, rulings, awards, certificates, order notes)

As a panellist is supplied with an order note prior to the date of hearing together with a notification, they are required to ensure that the ELRC order number is clear on the invoice and the issued order note is attached.

To ensure that an order note is issued, a panellist must ensure that the ELRC Entity Maintenance Form is properly filled in and sent to the Council together with a tax clearance

certificate (if applicable) prior to dates being requested, so as to allow the Council to send out a notification with an order note to the panelist.

An order number must not be confused with an invoice number, an order number identifies the approved process and the invoice number identifies the payments claimed against the order note. An invoice number should be unique to each invoice

If a panelist needs to claim for travelling, the distance in terms of Km's travelled must be properly stated including the set rate and total on the invoice. The set rate can be found in the ELRC fee policy.

Should there be a need for overnight accommodation, a panelist is required to put this request in writing c/o the General Secretary, outlining all details and justifying the request. The General Secretary, will, at his sole discretion, make a determination based on the facts presented. Based on whether the request is approved, the Council will thereafter make all the necessary arrangements via the Council's service providers as per the panelist's logistical requirements.

Dates

All available panelist dates must be forwarded to a dedicated e-mail address. Only dates received via this e-mail address will receive confirmation and allocation for matters.

E-mail address: dates-awards@elrc.co.za

Referral Forms

All referrals and correspondence must be forwarded to a dedicated fax. The Council will not take responsibility for documents faxed to any other fax number in the Council.

Facsimile number: 012 643 1601

Postponement

Unfair labour Practice disputes will be set down for conciliation and pre-arbitration before arbitration and must be attempted to be resolved within 45 days except for appointment/promotion disputes which must be attempted to be resolved within 30 days.

Dismissal disputes will be set down for conciliation and arbitration (con-arb) and must be attempted to be resolved within 45 days.

If 30 days lapses without an unfair labour practice dispute being scheduled for conciliation, an outcome certificate will be issued and the matter will proceed to pre-arbitration and arbitration.

A party who applies for postponement applies for an indulgence and must therefore show good cause for the interference with the other party's procedural right to proceed. Prejudice forms the basis upon which such an application is considered. Prejudice to both parties including that of the Council must be taken into account. A postponement cannot be claimed as a matter of right despite an offer of an appropriate order as to costs. Therefore, notwithstanding the fact that the ELRC Constitution does allow for postponement, it still lies within the General Secretary's discretion whether or not to grant the indulgence sought. This indulgence has been abused in the past by both parties and arbitrators causing an increase on wasted costs to the Council. The Council has therefore taken a decision that only postponements where good cause is shown, such as illness, will be granted regardless of the fact that the parties have agreed to a postponement. This is because parties tend to agree on postponement without taking into consideration the costs already incurred by the Council. Postponemets are therefore not to be granted merely upon request. Panelists are required to apply their mind in the granting of postponements. All requests for postponements (whether granted or not) must be reduced to a ruling.

Jurisdiction

The Council is in the process of requesting the departments of education in the different provinces to provide the Council with lists of all their employees who have been dismissed in terms of section 14 (1) of the Employment of Educator's Act on a regular basis so as to allow the Council to immediately issue letters of no jurisdiction on receipt of a Referral Form from such Educators. This will reduce unnecessary costs in that such matters will not be scheduled only to be dismissed at conciliation for no jurisdiction.

Condonation applications

Condonation applications which are referred to the Council subsequent to receiving a letter from the Council stating that their Referral Form is received outside the required timeframes will not be registered and considered without being first served to the respondent.

Joinder

Appointment and promotion disputes will not be registered and scheduled if the information of the person who is supposed to be joined is not provided on the Referral Form. Such a Referral Form will be considered to be incomplete. Only appointed persons are legitimate second respondents.

Our processes

Before commencing detailed preparation, a representative should make sure that they know and understand the issues to be determined, the arbitrator's powers and the procedure which is to be followed. This may all be obtained from a careful reading of the ELRC Constitution, Education Policy Handbook, and most importantly the Referral Form including the supporting documents attached to it.

The panellists are suppose to guide the Council on any issue they may come across in their preparation which the Council may have missed and/or my prolong the resolution of the issues in dispute such as joinder, jurisdiction etc. so as to enable the council to take the initiative to resolve them within the 14 days notice before arbitration.

Most arbitrations are supposed to take not more than one day to complete. With a view to curtail the duration of arbitrations and in order to facilitate settlement, the procedure of pre-arbitration conferences was introduced. Arbitrations which proceed for longer than a day must be accompanied by the necessary motivation by the panellist to schedule the matter for additional days. Parties are also encouraged to address certain issues via "heads of arguments", where applicable.

Panellists are now required to deal with the issue of postponements, dismissal of disputes, jurisdiction, joinders etc. in the form of a proper ruling.

Awards

An electronic award must be received by the Council within 14 days after arbitration with an electronic signature attached to it or with the words "duly signed" on it. The original award must be received at least seven days thereafter with a hand-written signature on it.

All awards are now perused for quality control purposes before they are delivered to the parties. If the award does not meet the quality control standards a perusal certificate is issued and the award is returned to the panellist for rectification. The Council will issue a guideline manual in due course. In the meantime, the panellist can use the CCMA training manuals for guidance otherwise the perusal certificate will state exactly what needs to be rectified. Electronic awards/reports must also be forwarded to the dedicated e-mail address stated previously.

Rescission and variations application

Rescission and variation applications must be served on the respondent and proof of service must be attached to the application transmitted to the Council through the dedicated fax.

1.2 DEEMED DISMISSAL – SECTION 14(1)(a) of the EEA 76 of 1998

The ELRC does not have jurisdiction to hear matters pertaining to section 14(1)(a) of the Employment of Educators Act (*see Phenith v Minister of Education and Others 2005):*

An educator appointed in a permanent capacity …who is absent from work for a period exceeding 14 consecutive days without permission of the employer …shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct.

In *Minister van Onderwys & Kultuur & andere v Louw 1995 (4) SA 383 (A) at 389*. In that case section 72(1) of the Education Affairs Act No 70 of 1988, which is for all purposes an exact replica of section 14(1) of the EEA (except for the fact that the section required the educator to be absent for more than 30 days and not only 14 days), was considered. The Appellate Division held that the services of an employee in respect of whom the deeming provision applies comes

about by operation of law once such employee absents himself from duty for more than 30 consecutive days without the requisite consent; there is no question of a review of an administrative decision; **the coming into operation of the deeming provision is not dependent upon any decision**; there is no room for reliance on the *audi alteram partem* rule which in its classic formulation is applicable when the exercise of an administrative discretion may detrimentally affect the rights, privileges or liberty of a person (at 388 – 389, emphasis added).

The case law makes it very clear that an employee in applicant's situation, is dismissed by operation of law and not by any act of the employer(see *Maidi v MEC for Department of Education & others (2003) 24 ILJ 1552 (LC); Nkopo v Public Health & Welfare Bargaining Council & others (2002) 23 ILJ 520 (LC); Public servants association of SA v Premier of Gauteng (1999) 20 ILJ 2106 (LC); Ntabeni v MEC for Education, Eastern Cape (2001) 22 ILJ 2619 (Tk)*). The reason for such approach, is easy to understand. The effect of a deeming provision has been explained as follows by Cave J in *R v Northfolk County Council (1891) 60 LJ (QB) 379 at 380* cited with approval in *Pinkey v Race Classification Board 1966 (2) SA 73 (E) at 77*, namely-

> "Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is deemed to be. **It is rather an admission that it is not what it is deemed to be** and that, notwithstanding it is not that particular thing, nevertheless…it is to be deemed to be that thing." (emphasis added)

Viewed from this perspective, it is clear that a deemed dismissal in terms of section 14 of the EEA, is not actually a dismissal in the true sense of the word. Furthermore section 186(1) of the LRA defines 'dismissal' as meaning that -

(a) an employer has terminated a contract of employment with or without notice;
(b) an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;
(c) an employer refused to allow an employee to resume work after she took maternity leave in terms of any law, collective agreement or her contract of employment;
(d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ another; or
(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee

From a practical point of view, only section 186(1)(a) needs to be considered when dealing with a deemed dismissal in terms of section 14 of the EEA. Section 186(1)(a) of the LRA clearly contemplates that the employer undertakes some action that leads to the termination of the contract, in other words the employer undertakes some initiative which has the consequence of terminating the contract of employment or performs some overt act which is the proximate cause of the termination of employment(see *Ouwehand v Hout Bay Fishing Industries* [2004] 8 BLLR 815 (LC) 818B-E). Similarly the Labour Appeal Court has held that the employer must have engaged in an act which brings the contract to an end(see *NULAW v Barnard NO* [2001] 9 BLLR 1002 (LAC) par23-26). In accordance with these principles it has for example been held that where an employee reaches her normal retirement age, there is no dismissal by the employer(see *Schmahmann v Concept Communications Natal (Pty) LTD* (1997) 18 ILJ 1333 (LC)).

1.3 Postponement

An applicant for a postponement seeks an indulgence and it is for him or her to satisfy the court or tribunal that it should grant such indulgence(see *Isaacs v University of Western Cape 1974 (2) SA 409 (C) 411H*). The Labour Appeal Court itself has held as follows in the well known case of *Carephone (Pty) Ltd v Marcus*:

> "In a court of law the granting of a postponement is not a matter of right. It is an indulgence granted by the court to a litigant in the exercise of a judicial discretion. What is normally required is a reasonable explanation for the need to postpone and the capability of an appropriate cost order to nullify the opposing party's prejudice or potential prejudice"(see *Carephone (Pty) Ltd v Marcus* 1999 (3) SA 304 (LAC) 320D para 54).

Very recently, in *Fundi Projects & Distributors (Pty) Ltd v CCMA* (2006) 27 ILJ 1136 (LC) at 1140, the Labour Court once again set out the principles which the CCMA and other employment tribunals such as the ELRC should apply when considering whether a postponement should be granted or not. Van Niekerk AJ referred with approval to the remarks made by the Labour Court in *Insurance & Banking Staff Association & Others v SA Mutual Life Assurance Society* (2000) 21 ILJ 386 (LC) at 394:

"In an application for postponement, the legal principles established in the High Court over the years apply equally in practice in the Labour Courts. For the purpose of the present application, the following principles apply:

(a) The trial judge has a discretion as to whether an application for postponement should be granted or refused. *(R v Zackey 1945 AD 505; Myburgh Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 (Nm).)*

(b) That discretion must at all times be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons*. (R v Zackey ; Myburgh Transport ; Joshua v Joshua 1961 (1) SA 455 (G) at 457D.)*

(c) The trial judge must reach a decision after properly directing his/her attention to all relevant facts and principles. *(Prinsloo v Saaiman 1984 (2) SA 56 (O); Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another 1988 (3) SA 132 (A).)*

(d) An application for postponement must be made timeously, as soon as the circumstances which might justify an application become known to the applicant. However, in cases where fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement, even though the application was not timeously made. *(Myburgh Transport ; Greyvenstein v Neethling 1952 (1) SA 463 (C).)*

(e) The application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.

(f) 'Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised.' What the court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms. *(Herbstein & Van Winsen The Civil Practice of Superior Court in SA (3 ed) at 453; Myburgh Transport .)*

(g) 'The Court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the Applicant if it is not.'

(h) Where the applicant for a postponement has not made the application timeously, or is otherwise to blame with respect to the procedure which the applicant has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the court in its direction might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on a scale of attorney and client. Such an applicant might even be directed to pay the costs of the adversary before the applicant is allowed to proceed with the action or defence in the action, as the case may be. *(Van Dyk v Conradie & another 1963 (2) SA 413 (C); Tarry & Co Ltd v Matatiele Municipality 1965 (3) SA 131 (E); Myburgh Transport)"*

1.4 The Joinder

Any person who has a direct and substantial interest to the subject matter of the action before any court of law or tribunal, and whose interests and rights may be adversely affected by the judgement of the court or tribunal, has a right to be joined as a party to that action(see *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 168 - 170; *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (AD)).

It has been decided by the Labour Appeal Court that where in a promotion dispute, a third party has already been appointed in the position, and where the unsuccessful applicant is seeking substantive relief (in other words relief which may cause the successful third party to loose his position) or even just makes the allegation that the successful third party should not have been appointed, such a successful third party has a direct and substantial interest in the outcome of the litigation and must be joined as a party to the proceedings and be afforded an opportunity to participate in the arbitration should he wish to do so(see *Public Servants Association v Department of Justice, CCMA and others* (2004) 25 ILJ 692 (LAC) para 27 – 45).

An arbitrator commits a gross irregularity if he proceeds with the arbitration without the successful third party in a promotion dispute having been joined to the proceedings(see *National Commissioner of the SA Police Service v Safety and Security Bargaining Council* (2005) 26 ILJ (903) (LC) per Musi J).

The arbitration award will be set aside on appeal should the arbitration proceed without such joinder having been effected (see *Public Servants Association v Department of Justice, CCMA and others supra* para 45).

Nothing however prevents joinder of a party at the arbitration stage, if that party did not participate in the conciliation (see *Mokoena & others v Motor Component Industry (Pty) Ltd & others* (2005) 26 ILJ 277 (LC)).

In the ELRC, I regularly heard representatives commenting prior to the New ELRC constitution (Resolution 1 of 2006) being adopted, that because the constitution of the ELRC does not provide for joinder, therefore they need not join third parties and therefore this tribunal cannot order joinder. This argument is completely without any merit and simply wrong. Joinder is not something which originates in the rules of a tribunal or court. It is based upon the duty to act fairly and more specifically on the common law principle, that whenever the rights, interests or legitimate expectations of a person could be affected by a decision, he has a right to be heard. Even at common law, a statutory body or a tribunal has a duty to afford any person, whose rights interests or legitimate expectations may be affected, an opportunity to be heard by joining him(see *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A); *PSA v Department of Justice & others* [2004] 2 BLLR 118 (LAC) para 34). So for example the Supreme Court of Appeal held in *Du Preez & another v Truth & Reconciliation Commission* 1997 (3) SA 204 (A), that even though the Truth and Reconciliation Commission had no rules relating to joinder, it was compelled to join third parties whose interests could be affected during the hearings. At 230I–231A of the judgment, Chief Justice Corbett remarked:

> "In my view, the solution to the problems raised by the issues in the case may be found in the common law, and more particularly the rules of the common law which require persons and bodies, statutory and other, in certain instances to observe the rules of natural justice by acting in a fair manner. In recent years our law in this sphere has undergone a process of evolution and development, focusing upon that principle of natural justice encapsulated in the maxim audi alteram partem ".

The audi alteram partem maxim refers to the principle in terms of which a party must be afforded a right to be heard, before his rights and interests may adversely be affected by a decision.

In *PSA v Department of Justice & others*, the Labour Court was dealing with a case which was arbitrated at a time when the CCMA still had no statutory powers to make any rules (such as for example rules relating to joinder) regulating its proceedings. The Labour Appeal Court held that this did not mean that the CCMA could not and did not have the power to order joinder where a third party had a direct and substantial interest in the dispute. Such a power to order joinder, the Court held, was incidental to the performance of the CCMA's main functions and it did have the power and was indeed compelled to order joinder where a third party had a direct and substantial interest in the dispute(see *PSA v Department of Justice & others* [2004] 2 BLLR 118 (LAC) para 22). The same principle would apply to any other statutory body such as the ELRC.

In *PSA v Department of Justice & others*, the Labour Appeal Court went so far as to say that even where an applicant in a promotion dispute seeks no relief against the successful candidate who was appointed in the position, the mere fact that the arbitrator may eventually find that the successful candidate should not have been appointed in the position, is already sufficient reason to make joinder of that successful candidate compulsory (see para 38 to 39 of the judgment).

1.5 *Chapter 4 of the Tokiso Review*

WHAT THE RUSTPLATS DECISION MEANS FOR ARBITRATORS

1.5.1 What the Constitutional Court held

Put simplistically, the majority of the Constitutional Court in the Rustplats[1] decision laid down the following principles in respect of CCMA (as opposed to private) arbitrations:

- An arbitration under the auspices of the CCMA is a hearing de novo;
- CCMA arbitrations constitute administrative as opposed to judicial action;
- The commissioner's role is to act as an impartial adjudicator and is not required to defer to the employer;
- The reasonable employer (range of fairness) test is not part of our law;
- The Promotion of Administrative Justice Act (PAJA)[2] does not apply to reviews of CCMA awards;
- CCMA awards must be lawful, reasonable and procedurally fair and can be reviewed where the decision is one that a reasonable decision maker could not reach;
- The test formulated in *Carephone (Pty) Ltd v Marcus NO*[3] - namely that the outcome is required to be justifiable in relation to the reasons, is no longer applicable.

1.5.2 A hearing *de novo*

The Court approved the LAC dictum in *County Fair Foods*[4] that CCMA arbitrations are hearings de novo (paragraph [18] of the judgment) and that the decision of the arbitrator is not reached with reference to the evidential material that was before the employer at the time of its enquiry, but on the evidential material placed before the arbitrator during the CCMA arbitration hearing.

However, the court did not address the controversial question of whether the CCMA commissioners should admit new evidence (for example which discloses a defence) that was not made available to the employer at the time of the hearing. The authorities consulted on this point recommend that:

- Arbitrators should admit such evidence;
- When admitting such evidence arbitrators should enquire into the reasons for the evidence not being made available at the time of the employer's enquiry;
- In the absence of a plausible explanation, arbitrators should bear in mind that an endeavour by a party/witness to admit different evidence from testimony presented at the enquiry could compromise the credibility of a witness/party, could indicate that the evidence has possibly been manufactured, and could contradict evidence and explanations tendered by a witness or a party to the enquiry.
- In such circumstances an arbitrator could be entitled to reject such testimony on the basis of it being inconsistent and contradictory, and this could in turn affect the remedy granted.

1.5.3 Duties of commissioners

The Rustplats judgment also deals at some length with the duties of the commissioner, and the majority of the Court provided (at paragraph [79]) that:

- The commissioner must assess whether the employer's decision to dismiss was fair;
- The commissioner is not given the power to consider afresh what he or she would do, but is simply entitled to decide whether what the employer did was fair;
- The commissioner is not required to defer to the decision of the employer; and
- The commissioner is required to consider all relevant circumstances in arriving at that decision.

Although Ngcobo J and three other judges differed on the issue of the review test and whether the arbitrator's conduct was administrative action, Ngcobo J nonetheless agreed with the majority of the Court regarding the proper approach that commissioners should adopt in the conduct of arbitrations (paragraph [161]). In this regard he provided the following separate, concurring views:

- The test that a commissioner must apply is one of fairness and the commissioner should not defer to the employer or display bias in favour of either party;
- The commissioner is required to consider the reasonableness of the employer's rule and the appropriateness of the employer's sanction;

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1 *Sidumo & another v Rustenberg Platinum Mines Ltd & others* (Unreported CCT85/06)
2 Act 3 of 2002
3 *Carephone (Pty) Ltd v Marcus NO & others* 1999 (3) SA 304 (LAC); 1998 (11) BLLR 1093 (LAC); (1998) 19 ILJ 1425 (LAC). It should be noted that this case was decided before PAJA was promulgated.
4 *County Fair Foods (Pty) Ltd v CCMA & others* [1999] 11 BLLR 1117 (LAC); (1999) 20 ILJ 1701 (LAC) at paragraph [11]

- The commissioner must not decide what the appropriate sanction is, but whether the employer's sanction was fair;
- The determination of fairness must not be left to the "unconstrained value judgment of the commissioner", and the commissioner is required to consider the interests of the workers and employers, the reasons for the employer having the rule and for prescribing the penalty for breach, and the importance of the rule for running the business;
- In ascertaining whether the employer's conduct was fair, the commissioner is also entitled to consider industrial norms and how other employers would respond to the misconduct.
- The commissioner is required to take cognisance of the provisions of s188 of the LRA and the Code of Practice (Schedule 8);
- The commissioner must consider all the above mentioned factors to formulate a conclusion as to whether the rule was a valid and reasonable standard, and whether the dismissal was an appropriate sanction; and
- Commissioners are generally not required to provide very detailed reasons.

Sachs J, in concurring with the majority, further elaborates on the duties of the commissioner and expresses the view that as the Constitution requires fair labour practices:

- The decision of the commissioner must be fair, impartial and reasonable;
- In order to be fair a commissioner should act reasonably, because an outcome that is beyond the bounds of reason would not be fair;
- In order to be fair there must be a reasonably sustainable fit between the evidence and the outcome

It is recommended that arbitrators bear in mind all of the above in the conduct of arbitration proceedings, as decisions may be reviewed where these duties are not complied with.

1.5.4 The test for review

Regarding the test for review, the majority of the Constitutional Court held that –

- The grounds for review in PAJA do not apply;
- Reviews must be conducted in terms of s145 of the LRA;
- Section 145 of the LRA must be read in accordance with s33 of the Constitution, which requires administrative action by the CCMA to be "lawful, reasonable and procedurally fair"; and
- The test for review is whether the decision of the commissioner is one that a reasonable decision maker could not reach (paragraph [110]).

Although the Court accepts that s145 of the LRA provides the grounds for review (subject to interpretation in terms of s33 of the Constitution) the majority of the Court did not elaborate on the extent to which the grounds for review specified in s145 (misconduct, gross irregularity, exceeding powers, or the award being improperly obtained) still apply, and how they must be construed. The Court also did not elaborate on what is meant by "lawful" and "procedurally fair" in terms of s33 of the Constitution, and this leaves an element of uncertainty in formulating a workable approach to reviews.

To add to this Sachs J, in concurring with the majority, indicated that CCMA can be reviewed in cases where -

- The outcome of the arbitration process must not fall outside the bounds of reason; and
- There must be a reasonably sustainable fit between the evidence and the outcome.

It is consequently possible to contend, until we have further clarity from the Courts on this issue, that all of the above grounds could be relied upon to found applications for review. To add to the confusion the majority of the Court expressed the view (at [112]) that the division between s33 and s34 of the Constitution is misconceived, and these rights overlap and are interconnected. Consequently, because Ngcobo J has explored the implications of interpreting s145 in terms of s34 of the Constitution it is possible that the grounds for review formulated by Ngcobo J in his dissenting judgement are applicable and Ngcobo J contends that decisions of commissioners can be reviewed if -

- There are patent irregularities;
- The commissioner committed a gross irregularity in the conduct of the proceedings by engaging in defective reasoning, by failing to apply his mind to the issues, or by failing to have regard to material facts; and
- The commissioner exceeded his powers in making an award which is manifestly unfair to either the employer or employee.

Consequently, until we have further clarity, commissioners seeking to avoid having their decisions taken on review should ensure that -

- Their awards are legally correct (in other words the award is lawful);
- The proceedings are procedurally fair;
- The decision is reasonable and not one that a reasonable decision maker could not make;
- There is a reasonably sustainable fit between the evidence and the outcome;
- The commissioner has applied his or her mind to the issues and has had regard to the material facts; and
- The award is not manifestly unfair to either the employer or employee.

1.5.5 Application to private arbitrations

Insofar as this decision deals only with CCMA commissioners, it is obiter in respect of private arbitrations, but a number of comments in the judgment, particularly those related to the conduct of commissioners (summarised in 4.3 above) are of highly persuasive value in respect of private arbitration awards.

Regarding the test for review, the grounds for reviewing an award of a private arbitrator will always be determined with regards to the terms of reference, and the parties have a number of choices:

- The arbitration can be conducted in terms of the Arbitration Act, in which case the narrow review test specified in s33 of the Arbitration Act will apply;
- The parties can exclude the Arbitration Act, in which case the common law grounds for review (as captured in PAJA) will apply;
- The parties can agree that the review test set out in s145 of the LRA will apply; or
- The parties can fashion a number of criteria for the arbitrator (for instance that the award must be reasonable, rationally justifiable and fair), and can then have the matter reviewed in the event of the arbitrator exceeding these powers.

Should the parties have failed to exclude the Arbitration Act then the narrow grounds specified in s33 of the Arbitration Act will apply. Even though the grounds for review specified in s145 of the LRA are identical to the grounds mentioned in s33 of the Arbitration Act, the test for private arbitrations is far narrower as the arbitrator is not engaged in "administrative action" and consequently the provisions of s33 of the Constitution do not apply.

1.5.6 Basic guidelines for panelists

In the light of the above, the following guidelines may be of some use to panelists:

1) Do not defer to either party, act as an impartial adjudicator.
2) Decide on the basis of the evidence placed before you whether the rule, sanction and decision of the employer is reasonable and fair and bear in mind the principles relating to the admission of new evidence mentioned in 4.2 above.
3) Do not substitute your view of what an appropriate sanction would be - merely decide whether the decision of the employer is fair.
4) If you come to the conclusion that the decision is unfair, refer back to your terms of reference regarding the remedies you are entitled to order.
5) As the reasonable employer test is not part of our law, do not have regard to a "range of fairness" in determining whether the decision of the employer is fair.
6) In determining fairness, consider all the material facts as well as the interests of the employer and the employee, the reason for the employer having the rule and the employer's reason for prescribing the penalty for breach. Also take into account the importance of the rule for the running of the business.
7) Have regard to industrial norms and how other employers would respond to the misconduct.
8) Take cognisance of the purpose of s188 and the Code of Practice (Schedule 8).
9) Ensure that the proceedings are fair, and that your decision is fair, impartial, lawful and reasonable, and that there is a reasonably sustainable fit between the evidence before you and the outcome.
10) Also make sure that the decision is one that a reasonable decision maker would make.
11) Be reluctant to consider dismissal for a first offence unless it is clear that the continued employment relationship is intolerable and that it would be inappropriate to expect the employer to apply progressive discipline to remedy the misconduct of the employee.
12) Note that a breach of trust will not on its own always warrant dismissal, as all relevant factors have to be taken into account - including the absence of dishonesty, the intention of the employee and the length of service.

Please note that while every effort has been taken to ensure the accuracy of this information, Tokiso cannot accept responsibility for reliance on the above, or on the recommendations provided herein.

Aggravating factors

Some aggravating factors in favour of the employer are:
(a) importance of the rule (para [78])
(b) basis of employees challenge (para [78])
(c) harm caused by the conduct (para [78])
(d) actual loss suffered as opposed to potential (para [114])
(e) extent to which trust relationship impaired
(f) prejudice to employer (para [116])
(g) seriousness of the breach (para [116])
(h) whether employee owned up to his misconduct
(i) employees credibility during proceedings (para [117])

- From the presentation given to Tokiso by Adv Afzal Mosam and Adv Feroze Boda

Mitigating factors

Some mitigating factors found in this case in favour of the employee are:
(a) importance of security of employment (para [72])
(b) promotion of labour peace (para [75])
(c) prospects of additional training and instruction (para [78])
(d) effect of dismissal on employee (para [78])
(e) service record (para [78])
(f) absence of dishonesty (para [117])
(g) clean record (para [117])
(h) whether losses occurred (para [117]).

- From the presentation given to Tokiso by Adv Afzal Mosam and Adv Feroze Boda

Source:
Tokiso. 2007. Tokiso Review 2007- 2008. *The annual report on the state of labour dispute resolution in South Africa.* Chapter4. p53-57.

2. *THE EQUALITY COURT'S VIEW ON AFFIRMATIVE ACTION AND UNFAIR DISCRIMINATION*

Du Preez v The Minister of Justice and Constitutional Development
2006 5 SA 592 (EqC)

2.1 Introduction

So pervasive are the consequences of our segregated past that the need for reform to redress the resultant imbalances cannot be doubted. Affirmative action is the catalyst. There are inherent difficulties in applying affirmative action measures. These include, firstly, the means to ensure the objective and effective application of affirmative action, and secondly, the extent to which previously advantaged groups are to be excluded. The present case illustrates the difficulties that courts are faced with in a challenge by a member of a previously advantaged group against alleged unfair discrimination due to the implementation of affirmative action measures. It is the first reasoned judgment of the High Court sitting as an Equality Court in this regard and, for this reason, is of particular significance.

2.2 Facts

Proceedings were instituted in terms of section 4 of the Promotion of Equality and Prevention of Unfair Discrimination Act (hereinafter "PEPUDA"), after the Magistrates Commission (the 2nd respondent), a statutory body whose functions include ensuring the appointment of judicial officers (s 4(a) of the Magistrates Act 90 of 1993) failed to shortlist the applicant for the position of magistrate in Port Elizabeth. This was despite the complainant having met the minimum requirements for the position, namely an LLB degree or a *Diploma Legum*, and at least seven years' post-university experience in law.

It was common cause that the Employment Equity Act 55 of 1998 (hereinafter "EEA") was not applicable to magistrates, in that in terms of the Magistrates Act they are judicial officers, independent of the public service, and subject only to the Constitution of the Republic of South Africa, 1996. They do not work for the state and are therefore not employees as defined in the Employment Equity Act (see *Van Rooyen v The State* 2002 5 SA 246 (CC)).

The primary issue for determination between the parties was whether the criteria for shortlisting for posts of regional magistrates in Port Elizabeth constituted, pursuant to the provision of section 13(2) of PEPUDA, fair discrimination. The complainant prayed for an order setting aside the criteria utilized to select suitable candidates to be shortlisted for the posts on the basis that the criteria were irrational, discriminatory and inequitable. He also prayed that the first and second respondent be ordered to re-advertise all the positions previously advertised during 2002 and 2003 and that the first and second respondents be directed to use criteria which were constitutionally sound and which did not constitute an absolute barrier to any prospective candidate as a result of race and/or gender.

The complainant had 19 years experience as a magistrate and held the degrees BJuris, LLB and Master of Public Administration, but was not shortlisted for the post of regional magistrate. Instead two black female candidates were shortlisted.

The three criteria that were used to compile a shortlist were experience as a magistrate (the parties agreed that a further criterion relating to experience in other legal occupations should for all practical purposes of the application be ignored, since it played no role in the shortlisting), qualifications, and race and gender. For each category a score was allocated. The scoring system was so constructed that the maximum which a white male could score was 5 points (3 for experience and 2 for qualifications). (Counsel for the applicant pointed out that, realistically speaking, the overwhelming majority of aspirant regional magistrates do not have the degree of LLM but generally only LLB.) The maximum number of points which a white male with the lesser degree could accumulate was 4. The minimum that other applicants could achieve was: black male 5 (1 for experience, 1 for qualifications and 3 for race); white female 5 (1 for experience, 1 for qualifications and 3 for gender); black female 8 (1 for experience, 1 for qualifications, 3 for race and 3 for gender). Black males and white females could score a maximum of 8 points (3 for experience, 2 for qualifications and 3 for race or gender). The maximum that a black female could score was 11 (3 for experience, 2 for qualifications, 3 for race and 3 for gender). The resultant position can be summarized as follows:

(a) white males with maximum points would score the same as black males and white females with minimum points;

(b) white males with only an LLB degree (presumably the majority of the prospective candidates) would automatically be outscored by all other categories of candidates;

(c) black males and white females with maximum points would score the same as black females with minimum points;

(d) black women with the minimum points would outscore all other categories of candidates with only an LLB degree.

It was common cause that the shortlisting was done exclusively on the result of the score sheets (596D-597F).

2.3 Reasoning of the court and judgment

The court pointed out that equality among all people in South Africa lies at the heart of the Constitution (599B). Equality is guaranteed in the Bill of Rights in section 9 as follows:

> "9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
> (5) Discrimination on one or more of the grounds listed in subsection (3) is

unfair unless it is established that the discrimination is fair."

Parliament's compliance with the dictate contained in section 9(4) of the Constitution was the enactment of national legislation in the form of twin measures. Firstly the EEA and secondly PEPUDA. Both these acts flow from and give effect to section 9(3) of the Constitution.

Section 6 of PEPUDA provides that neither the state nor any other person may unfairly discriminate against any person. There is concordance in wording between this section and section 9(3) of the Constitution. Both provisions unequivocally proscribe unfair discrimination in any form, including race and gender.
The court held therefore that it would be improper and unfairly discriminatory to take such factors into account in the appointment of magistrates were it not for the Constitutional and statutory approval of persons disadvantaged by unfair discrimination (600C).

PEPUDA gives wholehearted recognition to affirmative action.

Section 14(1) of PEPUDA provides:

> "It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons."

Section 13 of PEPUDA read with the definition in section 1 thereof provides that if the complainant makes out a *prima facie* case of discrimination, not disproven by the respondent, then, if the discrimination took place on the prohibited grounds of race and gender, it is unfair, unless the respondent proves that it was fair (603G).

Section 14(2) provides the following in this regard:

> "(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:
>
> (a) The context;
> (b) the factors referred to in subsection (3);
> (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned."

The court pointed out that these considerations do not supplant the test for the constitutionality of an affirmative action measure, but give substance to the test. All criteria are not applicable in all instances, nor do those that are relevant necessarily bear the same weight in the enquiry and each case is to be decided on its own facts and circumstances (604E-F).

Section 14(3) provides:

(3) The factors referred to in subsection (2)(b) include the following:

(a) Whether the discrimination impairs or is likely to impair human dignity;
(b) the impact or likely impact of the discrimination on the complainant;
(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
(d) the nature and extent of the discrimination;
(e) whether the discrimination is systemic in nature;
(f) whether the discrimination has a legitimate purpose;
(g) whether and to what extent the discrimination achieves its purpose;
(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to –
  (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
  (ii) accommodate diversity."

The court held that the shortlisting formula not only differentiated between the complainant and the other applicants, but also that the shortlisting criteria adopted discrimination on the grounds of race and gender because a disadvantage was imposed on the complainant that effectively withheld him from the benefit of being a regional magistrate in Port Elizabeth. This disadvantage was based on race and gender (605H).

The court, correctly it is submitted, rejected the contention on behalf of the respondent that although there was differentiation, there was no discrimination because the criteria used in the shortlist selection did not exclude the complainant in that there was no prohibition therein in respect of race and gender (605E-G).

The next question was therefore whether the respondents had proved that the measure was fair as envisaged in section 13 of PEPUDA.

The respondents contended that the discrimination was justified on the grounds that the Constitution enjoined them to have regard to the racial and gender composition of South Africa when judicial officers are appointed. Uncontested documentation was tendered to indicate that there was a real need for racial and gender diversification in the Port Elizabeth Regional Court bench (606C-D). The picture further emerged that the formulae for shortlisting in different districts varied significantly and that there was an obvious correlation between the composition of the various benches and the points allocated on the basis of race and gender in respect of each post. In one instance white males were favoured over all candidates because of the absence of white males on the regional court bench in that area. The court was therefore satisfied that the discrimination had a legitimate purpose (608C-D). It was the complainant's contention, however, that in the region of Port Elizabeth the application of the shortlisting formula in effect negated experience where a white male was in competition with other categories of candidates. In this regard reference was made to section 14(2)(c) (see above).

As a result of the manner in which the points were allocated under the various heads (see the explanation above), such experience in effect counted for nought in the case of a white male competing against any other category of persons (609F-G). Since the complainant's experience had no consequence, no equitable assessment of the merits of his application was possible. In regard to the shortlisted candidates, other criteria including legal knowledge, leadership, management skills and language proficiency were also considered. The narrow shortlisting formula ignored these criteria and was therefore inconsistent with the second stage of the procedure. The court held that as a consequence a white male candidate was not only prejudiced but that it was also not in the interests of society which requires that the regional courts function at the highest achievable level of efficiency (610D-E).

The court concluded that the effect of the committee's shortlisting formula was to raise an insurmountable obstacle for the complainant and that there was therefore an absolute barrier to his appointment (610D-E). Since the discrimination was built into a departmental policy, it was systematic in nature (see s 14 (3)(e)).

The court concluded accordingly that the respondents had failed to prove that the discrimination was fair. The shortlisting criteria were set aside and the first and second respondents were ordered to re-advertise the positions for Regional Court Magistrate, Port Elizabeth.

2.4 Discussion

The present case is important since it was handed down by a High Court sitting as an Equality Court and rendered in terms of PEPUDA. The Equality Courts function on two levels and are staffed by judges and magistrates who have been specially trained as presiding officers in Equality Courts for a region. Every High Court is an Equality Court in its jurisdictional area and one or more magistrate's courts is designated by the Minister as Equality Courts for a region. Scant authority is available regarding the prohibition of unfair discrimination and the effect of affirmative action in PEPUDA. The court accordingly adopted the approach followed by the Labour Court in terms of the Equity Act. In this regard the court held as follows:

> "[T]he two acts are sufficiently close for authority on the one to be of assistance in the interpretation and application of the other …" (605B-C).

The court warned, however, that "care must be exercised for the reason that the very fact of the closeness of the two enactments may cause authority on the one to be subtly misleading in the construction and application of the other" (605B-C).

What is important is that the court, like the Labour Court, adopted the test for unfair discrimination set out in *Harksen v Lane NO* (1998 1 SA 300 (CC)). This approach is logical, since both the EEA and PEPUDA flow from and give effect to section 9(3) of the Constitution.

In regard to the consideration of affirmative action in the context of unfair discrimination it is important to note that the court pointed out that although the similarity of the wording of section 14(1) of PEPUDA and section 9(2) of the Constitution is striking, the difference in wording is also significant (601E-G). In terms of section 9 of the Constitution the approval of affirmative action measures in the constitution translates into a declaration to the effect that such measures are not unfair discrimination. In *Minister of Finance v Van Heerden* (2004 25 *ILJ* 1593 (CC)) the Constitutional Court held that affirmative action measures do not attract a presumption of unfairness once it is proved that they satisfy the requirements of section 9(2) of the Constitution. The Constitutional prohibition of discrimination and the intention to promote equality are complementary, because both are aimed at ensuring the full enjoyment of rights. The concept of equality accordingly goes beyond the mere formal equality which requires identical treatment. Substantive equality recognizes that systematic disadvantage still persists and acknowledges that the taking of restitutionary (affirmative action) measures does not necessarily establish *prima facie* unfair discrimination.

An important consideration in the present judgment was that the shortlisting criteria established an absolute barrier to the complainant as a result of race and/or gender. The court accepted this argument and held that the respondents had failed to prove that the discrimination had been fair.

It is submitted that the criteria did not necessarily establish a general absolute barrier. Had there been no candidates from the designated groups the complainant would have been shortlisted. Moreover, a white male candidate with the complainant's experience and a LLM would have been shortlisted together with the two black female candidates.

It is also instructive to note that the formulae for shortlisting in different districts varied significantly and that there was an obvious correlation between the composition of the different benches and the points allocated on the basis of race and gender in respect of each post.

The purpose of the discrimination was therefore legitimate. It is submitted further that the goal of representivity was also pursued in a rational manner. The shortlisted candidates were not unsuitable as was the case in *Public Servants Association of SA v Minister of Justice* 1997 18 *ILJ* 241 (T) and, unlike the position in *Coetzee v Minister of Safety and Security* (2003) 24 *ILJ* 163 (CC) the respondents would not have made no appointments if there were no candidates from the designated groups. The complainant would have been shortlisted, and, in all probability, would have been approved.

What is significant is that there were minimum requirements that all candidates had to meet in regard to experience and tertiary education. The candidates from the designated groups were therefore suitably qualified and they were not recommended only because they were black and female. The remarks in *Stoman v Minister of Safety and Security* (2002) 23 *ILJ* 2020 (T) are instructive in this regard:

> "Some tension may in certain situations exist between ideals such as efficiency and representativity, and a balance then has to be struck. Efficiency and representativity, or equality … should not be viewed as separate competing or even opposing aims. They are linked and often interdependent. To allow equality or affirmative actions to play a role only where candidates otherwise have the same qualifications and merits, where there is virtually nothing to choose between them, will not advance the ideal of equality in a situation where a society emerges from a history of unfair discrimination. The advancement of equality is integrally part of the consideration of merits in such decision-making processes. The requirement of rationality remains, however, and the appointment of people who are wholly unqualified, or less than suitably qualified, or incapable in responsible positions cannot be justified."

In the event that, for example, there is a complete absence or very few qualified "black" males and females who have applied in comparison to a majority of white individuals, it would seem that loosening these restrictions would be necessary in order to accommodate a larger number of "whites". This could for example, run hand in hand with community development or apprenticeship schemes, in order to ensure the future availability of skills from the desired designated group. Conversely, where there is a larger pool of qualified black people, an effort should be made to ensure that a demographically proportionate number of individuals find employment.

The prevailing representation of various groups within the workforce should also be considered. In this instance, 9 of the 13 magisterial positions were already occupied by white males. Under such circumstances the poor representation of various groups certainly requires remedying. This flows from the need to take positive measures to achieve the desired ratio, due to the fact that the prevailing posts have already been filled by other categories of employees. It should be borne in mind that in as much as the Equality Act, and the Employment Equity Act, discourage such harsh measures as an "absolute barrier", there cannot be said to be a direct prohibition on such a measure. This, one could argue, flows from the reasoning that in some "reasonable circumstances" a "solid" attempt must be made to ensure that a certain group finds representation in the workplace. If applicants don't satisfy the requirements established (as in this case, qualifications and experience) and such applicants cannot reasonably be accommodated, it follows that for the sake of the continuance of effective services, those of other groups must be called to fill these positions. The previously discussed considerations should therefore be taken into account.

It is also submitted that a method of scoring to determine shortlisted candidates is not necessarily unfair provided such a method is rational and only allows suitably qualified candidates to be shortlisted. It is submitted that such an approach is in fact honest to the candidates from non-designated categories. There is no pretence that they will be considered when, in fact, they will not be as a result of the constitutionally supported concept of substantive equality.

This view seems bleak for candidates in the complainant's position, but it is a generally accepted principle that affirmative action is a temporary measure and will come to an end once its goal is achieved (Dupper and Garbers "Affirmative Action" in Strydom (ed) *Essential Employment Discrimination Law* (2004) 262). The authors state:

> "The goal of affirmative action, according to the Constitution, is the achievement of equality in the sense of the equal and full enjoyment of all rights and freedoms. Once this goal (equality) is achieved, the rationale for the measure to achieve it (affirmative action) falls away, in which case continued efforts in the interest of affirmative action might well be regarded as unfair discrimination" (Dupper and Garbers 262).

2.5 Conclusion

Affirmative action measures promote substantive equality in the workplace. The goal of these measures must, however, be presented rationally, and affirmative action cannot be an absolute defence in unfair discrimination cases. It is however, inevitable that the non-designated category of employees (*ie* white males), may be discriminated against as a result of these measures. Courts should guard against reverting to the formal notion of equality, because of the unfortunate consequences that these measures, of necessity, have on the non-designated group of employees.

Adriaan van der Walt and Peter Kituri

3 DEVELOPMENTS IN LABOUR LAW

VICARIOUS LIABILITY

An employer is liable for damage caused to a third party by the negligence of his employee when the latter is clearly acting wholly within the scope of his authority, or, in other words, when the employee is doing exactly what his employer told him to do. What is generally regarded as the most important consideration for the purposes of deciding whether a person is an employer at common law is whether the employer 'has the right to control, not only the end to be achieved by the other's labour and the general lines to be followed, but the detailed manner in which the work is to be performed'.

When government, as part of an industrial-relations exercise, appoints a driver to convey workers to funerals of deceased colleagues, it can be said that the driver executes his duties in the course and scope of his employment with the government. The fact that he is not paid for the driving does not in itself constitute conclusive proof that he is not acting within the course and scope of his employment.

MEC for Public Works, Eastern Cape v Faltein 2006 (5) SA 532 (SCA)

This matter concerned the vicarious liability of an employer for the conduct of an employee. F (the respondent) had been an employee of the Department of Public Works, stationed at Grahamstown. He sustained serious injuries in a bus accident in which he was a passenger. The bus was owned by the department. He subsequently sued the department for R1 364 000, alleged to be the difference between the damages actually suffered and an amount of R25 000 recoverable from the Road Accident Fund in terms of the Road Accident Fund Act.

F contended that the accident had been caused solely by the negligent driving of one B, also an employee of the department, while acting in the course and scope of his employment.

The bus had been made available by the department, as part of an industrial-relations exercise, to convey employees to attend the funeral of a deceased colleague. The deceased's relatives and friends were also permitted to travel on the bus. The understanding was that the employees who attended the funeral would appoint from their number a person who was employed by the department as a driver to drive the bus. He would then be given a written authority to do so by management.

Pursuant to this understanding one M was nominated as the driver of the bus and he was subsequently given the necessary authority. M drove the bus to the funeral, but when he boarded the bus with the intention of driving it back to Grahamstown he found B sitting behind the steering wheel. He asked the passengers in the bus whether B could drive back to Grahamstown, and they made it clear that they did not want him (M) to drive again.

It was common cause that a shop steward was appointed by those attending a funeral to be in control of the bus. F bore that responsibility on the day in question. However, it appeared that F's task was to ensure that discipline prevailed during the journey; he had no authority over the driver since the latter was appointed by management. Accordingly, F could not forbid B to drive the bus.

There was some dispute as to whether M had been paid for his services on the day in question. There was no evidence suggesting that B had been paid.

B was employed by the department as a driver. Part of his work was to convey workers to and from sites where they were to do duty. Such drivers had a blanket authority to drive the department=s vehicles for a month at a time. A government official testified that if there had been a problem with M driving the bus, management had no reason to object to B doing so. For that reason, no action was taken against the two drivers.

The government's defence was that B had not been acting in the course and scope of his employment at the time of the accident. The argument was that the bus had been operated by the passengers, including F, in the course of a private loan agreement concluded between them and the department.

The trial Court upheld F's claim, whereupon an appeal was lodged to the Supreme Court of Appeal.

The appeal was dismissed. The SCA pointed out that B had not been driving the bus back from the funeral for his own purposes. He was doing exactly what M had been instructed by management to do, *ie* to convey the passengers back to Grahamstown after the funeral. It could not be said that B was the employee of the passengers for the time being; they had no right to control how he drove the bus. In the circumstances B had been acting in the course and scope of his employment with the government at the time of the accident.

LEGAL DUTY OF THE OWNER OR OCCUPIER OF PROPERTY (DUTY OF CARE)

The owner or occupier of a property has a legal duty to ensure that those whose presence can reasonably be anticipated on the property are not harmed by the condition of the property or a construction on the premises. However, the law does not impose a general duty on an owner or occupier of business premises to protect customers against possible assaults by other customers by, for instance preventing all customers from carrying weapons onto the property. If this was the law, life in South Africa would become unbearable and the duty cast on owners and occupiers limitless.

Tsogo Sun Holdings (Pty) Ltd v Qing-He Shan and Another
2006 (6) SA 537 (SCA)

The appellant operated a casino in Sandton. The respondent had been shot in the parking area of the casino by the second respondent on

21 June 2001, after having left the casino in the company of the second respondent. The second respondent was charged with attempted murder and undertook to pay the first respondent an amount of R200 000 as damages. However, the first respondent sought to recover all his damages (some R560 000) from the appellant.

The trial Court found in favour of the first respondent whereupon an appeal was lodged to the Supreme Court of Appeal.

The first respondent's case was that the appellant had a legal duty to take reasonable steps to ensure the safety of customers on the premises. According to the first respondent it was reasonably foreseeable that one gambler could pose a risk to other gamblers; accordingly the guards had to search all customers. Had they done so in the present case they would have found that the second respondent carried a firearm.

The trial Court came to the conclusion that 'given the peculiar circumstances of the case' the appellant owed everyone at or inside the casino a duty of care. The appellant had deployed security personnel at all entrances as a result of an earlier armed robbery. The guards had specific instructions to prevent people from entering the casino with firearms. According to the trial judge the failure to body search the second respondent was a breach of their instructions and the appellant remained liable for the negligence of its security contractor.

The appeal succeeded. The reasoning was as follows:

- It was not reasonably foreseeable that a regular patron of the casino, such as the second respondent, could be a danger to another patron. Because of the earlier armed robbery by a gang the appellant had instructed a security company to be on the lookout for possible members of armed gangs. The second respondent hardly fell within that category. He was a regular visitor to the casino and an esteemed patron.

- A facility such as a casino should be consumer-friendly. In the present case some 30 000 persons regularly visit the casino over weekends and in the circumstances one could not have expected the appellant to body search each and every patron for weapons.

- In any event, the appellant's alleged failure to body search the second respondent was not legally connected to the shooting incident. What really caused the shooting was that the first respondent had become involved in a dispute with the second respondent in the casino and invited the latter outside to 'resolve' the matter. What really caused the shooting was the first respondent=s intent to involve the second respondent in a physical fight.

The legal principle formulated by the SCA is summarised in the headnote above.

UNDUE DELAY – FINALITY OF ADMINSTRATIVE DECISIONS

An employee of a public body wishing to institute review proceedings to set aside a decision of a disciplinary committee should do so without undue delay. Whether there has been undue delay entails a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances.

Gqwetha v Transkei Development Corporation Ltd and Others
2006 (2) SA 603 (SCA)

G had been employed by the first respondent as an accounts supervisor until 28 June 1995. She was dismissed on that date following a disciplinary hearing chaired by the second respondent. Her appeal against the termination of her services failed and her dismissal was confirmed by the third respondent on 26 July 1995. More than a year later, on 30 September 1996, G instituted review proceedings in which she sought an order reviewing and setting aside the decisions of the second and third respondents and directing the first respondent to reinstate her forthwith.

The High Court found that the delay in instituting the proceedings was unreasonable but nevertheless condoned it and granted the relief sought. The respondents' appeal to the Full Court succeeded. G thereupon lodged an appeal to the Supreme Court of Appeal. Her sole explanation for the delay in commencing proceedings was that she was awaiting a transcript of the disciplinary proceedings which resulted in her dismissal. However, what was not explained at all was what relevance the transcript had to G's ability to commence review proceedings.

The appeal was dismissed. The Court found, on the facts, that G's reliance upon the absence of the transcript to explain the delay was without merit. On the facts, the delay in instituting the proceedings (a period of some 14 months), for which there was no adequate explanation, was unreasonable. In coming to this conclusion the SCA made the following observations:

- It is important for the efficient functioning of public bodies (such as the first respondent) that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The reason for this rule is twofold: firstly, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.

- Proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay. However, the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight.

- Whether there has been undue delay entails a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances, including any explanation that is offered for the delay. A material fact to be taken into account in making the value judgment is the nature of the challenged decision. Not all decisions have the same potential for prejudice to result in them being set aside.

- The decision in the present case concerned the dismissal of the appellant for complicity in financial irregularities. A decision of that kind will necessarily have immediate consequences for the ordinary administration of the organisation, as well as for other employees who will be called upon to perform the functions of the dismissed employee or even to replace her. The very nature of such decisions speaks of the potential for prejudice if they could be set aside on review after the lapse of a considerable time.

COMMON LAW REVIEW OF DISCIPLINARY TRIBUNALS

At common law the High Court has jurisdiction to review the decisions taken by disciplinary tribunals established by contract provided the contract incorporated the principles of natural justice either expressly or by implication. However, decisions of such disciplinary tribunals do not fall within the definition of 'administrative action' contained in s 1 of the Promotion of Administrative Justice Act 3 of 2000 and are therefore not reviewable under the Act.

Klein v Dainfern College and Another
2006 (3) SA 73 (T)

The applicant had been employed as a teacher by the first respondent, a company registered in terms of s 21 of the Companies Act 61 of 1973. The applicant's employment contract stipulated that misconduct 'will result in the application of appropriate disciplinary action as per the college's disciplinary procedure'. The 'disciplinary procedure and code' of the college formed part of the contract of employment.

The applicant was found guilty of 'gross insolence' and a sanction comprising a formal written warning was imposed. The present litigation followed, in which the applicant sought a judicial review of the first respondent's disciplinary tribunal. The application was brought in terms of the rules of the High Court, alternatively in terms of ss 6 and 7 of the Promotion of Administrative Justice Act 3 of 2000 ('the Act').

The facts giving rise to the disciplinary hearing were that the applicant had on Monday 2 August 2004 stormed into the principal's office and yelled at him, making false accusations without first enquiring and listening to his explanation. She then left his office and in front of other staff called the principal a 'bastard'.

The applicant raised a number of points on review, one of them being that the disciplinary code in question referred to a 'table' setting out the actions considered to be offences. However, no 'table' was made available to the applicant and she did not know whether a table had actually ever been published. Accordingly, she did not know what actions constituted 'gross insolence' and whether, in fact, 'gross insolence' constituted conduct that could lead to disciplinary action.

The first respondent raised a preliminary point, namely that the applicant was not entitled to a judicial review of a decision taken by a (private) disciplinary tribunal which had been created by contract. Moreover, so it was argued, the decision taken by the disciplinary tribunal did not constitute administrative action entitling the applicant to a judicial review in terms of the Act.

The application for review succeeded. An order was issued directing the first respondent to withdraw the written warning. The reasoning was as follows:

- The High Court has inherent jurisdiction to review decisions of domestic tribunals established by contract where the principles of natural justice are included as part of the agreement. The rationale for this rule is to be found in the unequal bargaining position of employees. There is nothing in the Constitution that abrogates this common law principle.

- In the present case the employment contract included the principles of natural justice expressly.

- The Promotion of Administrative Justice Act deals with 'administrative action'. Decisions of domestic tribunals established by contract do not fall within the definition of 'administrative action' and are therefore not reviewable under the Act.

- One of the principles of natural justice is that an accused is entitled to have the charge clearly formulated with sufficient particularity so that he or she has no misunderstanding as to the specific act or conduct proposed to be investigated. The charge sheet must clearly indicate the nature of the offence although it need not be set out in the same detail and precision as is required in a criminal indictment. In the present case the disciplinary code forming part of the applicant's contract of employment specifically required the offences to be set out in a table. It therefore contemplated that the offence of 'gross insolence' would be defined in a separate table setting out what kind of conduct would be regarded as such. Without reference to such a definition one would not be able to establish the particular misconduct or offence for which the applicant had been charged. That being the case, the applicant was materially prejudiced in not knowing the full extent and nature of the offence with which she was charged.

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