

SOUTH AFRICA / JUDGMENT

Mlaba v Masonite (Africa) Limited (D241/97) [1998] ZALC 129 (15 January 1998) [1998] ZALC 129

COURT

Labour Court

BEFORE

R M M Zondo

CASE / FILE NUMBER

D241/97

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IN

THE LABOUR COURT OF SOUTH AFRICA

SITTING

IN DURBAN

CASE NO.

D241/97

DATE

1998/01/15

In

the matter between:

ROBERT
MPHIKELELI MLABA Applicant
and
MASONITE
(AFRICA) LIMITED First Respondent
GARTH
JENKIN Second Respondent
COMMISSION
FOR CONCILIATION,
MEDIATION
AND ARBITRATION Third Respondent

JUDGMENT

DELIVERED BY THE HONOURABLE MR JUSTICE ZONDO

ON 22 JANUARY 1998

ON BEHALF OF APPLICANT: ADV P BLOMKAMP instructed by

Von Klemperer Davis and Harrison Inc.

Pietermaritzburg

ON BEHALF OF ADV G O VAN NIEKERK instructed by

FIRST RESPONDENT Shepstone & Wylie, Durban

TRANSCRIBER

SECRETARIAL SERVICES

J U D G M E N T

ZONDO J:

[1]

Introduction:

In this matter the applicant, a former employee of the first respondent, brings this application by way of review. In effect, he seeks an order reviewing and setting aside an arbitration award made by the second respondent ("The Commissioner"), under the auspices of the third respondent ("The CCMA"), that his dismissal by the first respondent on the 3rd January 1997 was fair. In the event of the Court setting that award aside, the applicant prays for an order reinstating him in the first respondent's employ, and costs.

Background

to the dismissal:

[2] Masonite (Africa) Limited, the first respondent in this matter, conducts the business of a manufacturer of pulped timber and board products in Estcourt, KwaZulu/Natal. The applicant was part of the workforce which the first respondent had as at December

1996. In fact, the applicant had been in the first respondent's employ for about 12 years as at that time. The first respondent's process of manufacturing timber boarded products under the "Masonite" brand name is run on a continuous basis with the use of a three-shift system throughout the year. Although many of the workers employed by the first respondent are continuous shift workers in respect of whom the first respondent had obtained an

exemption from provisions of the Basic Conditions of Employment Act, 1983 (Act No 3 of 1983) ("the BCEA"), such exemption did not apply to the applicant. The applicant was a day worker, working five days a week. The applicant's normal hours of work (other than during year-end shut-downs) were from 07:00 to 16:45, with the first tea break from 10:00 to 10:10, with the lunch break being from 12:00 to 12:30, and the second tea break being from 15:15 to 15:25, and the knocking-off time being at 16:45. However, on Fridays the knock-off time was 16:30 and not 16:45.

[3] During year-ends, the first respondent has an annual shut-down, and most of its workers take their annual leave during that period of the year. However, during the annual shut-down some of the workers remain behind to work - it appears that they mainly perform maintenance work so as to ensure that when the plant reopens in the New Year, it is ready to resume its operations fully and properly. The applicant used to be one of those workers who remained behind to work during year-ends. During such periods the hours of work would be changed or adjusted partially. The applicant says during such shut-down periods the hours of work would be as follows: start at 06:00, tea break 09:30 to 09:40, lunch break 12:00 to 12:30, afternoon tea break 15:15 to 15:25, and knock-off time at 17:00. The applicant's version on this is to be found in paragraph 4.4 of his founding affidavit. The first

respondent's answer thereto is in paragraph 41 of its answering affidavit. There the first respondent neither specifically admits nor denies the applicant's version but simply says the daily working hours of the applicant and other employees during the December 1996/1997 shut-down were those set out in Annexure B to the answering affidavit. The only difference one can decipher from Annexure B in relation to the applicant's version on this issue is simply that on Tuesday, the 24th December and Tuesday, the 31st December the knocking-off time was going to be 12:00, instead of 17:00 - obviously to let the workers knock off early for Christmas and New Year, respectively. I have excluded the 20th December 1996 in looking at the differences in the two versions.

[4] Prior to the December 1996 shut-down the first respondent had issued a notice inter alia stipulating the hours of work which were to be applicable during the shut-down. The hours stipulated were as stated in Annexure B to both parties' respective main affidavits. The hours of work for the shut-down were to be as follows: start work: 06:00; tea break 09:30 - 09:40; lunch break 12:00 - 12:30; tea break 15:15 to 15:25; knock-off: 17:00. It will be seen from this that in terms of this notice the applicant and the other workers were going to continue to have both the morning and the afternoon tea breaks of ten minutes' duration each. According to the applicant, in the course of

the day on the 21st December 1996 a notice was put on the notice board by the management, purporting to amend the hours of work, to be observed during the shut-down. That notice of amended hours of work appears as Annexure C to the applicant's founding affidavit. There were only two differences between the hours of work as stipulated in Annexure B on the one hand and those stipulated in Annexure C on the other. The amended hours of work as stipulated at the bottom of Annexure D to the first respondent's answering affidavit are also the same hours of work as stipulated in Annexure C to the applicant's founding affidavit. The first point of

difference was that, whereas, according to Annexure B, there were two tea breaks per day, namely the morning tea break and the afternoon tea break, there was now to be only one tea break, namely the morning tea break. The afternoon tea break was done away with. However, the duration of the morning tea break was extended from 10 minutes to 20 minutes. The second point of difference was that, whereas according to Annexure B, the applicant's lunch break was to be from 12:00 to 12:30, according to Annexure C it was to be from 13:00 to 13:30. When all is said and done, the final position is that for the morning tea break the workers, including the applicant, were given ten additional minutes in return for not taking the afternoon tea break and in return for the shifting of the lunch break from 12:00 to 13:00. Also the final point to be borne in mind is that from either the 21st or 22nd December 1996 the first

respondent required its employees, including the applicant, to work in accordance with the hours of work as stipulated in Annexure C to the applicant's founding affidavit during the December 1996/January 1997 shut-down and no longer according to the hours of work for the same shut-down as stipulated in Annexure B. As to what prompted the idea of the further amended hours of work for the shut-down, the first respondent says in its opposing affidavit its management was approached by workers for this change and this change was effected in order to accommodate concerns expressed by workers. However, there was evidence before the second respondent by the first respondent's own witness, one Mr Hoffmann, suggesting that the idea originated from the management rather than the workers. I do not consider it necessary to resolve that issue.

[5] It is common cause that, despite the first respondent's requirement that the workers (including the applicant) should work according to the amended hours of work during the December 1996 shut-down, the applicant did not comply with this requirement but continued to work according to the hours of work for the shut-down as originally stipulated in Annexure B. This means that the applicant restricted his morning tea break to 10 minutes when other workers had a morning tea break of 20 minutes. It also means that he would take his lunch break from 12:00 to 12:30, when everyone else continued to work. It follows that he would return to work at

12:30. When the other workers took their lunch break at 13:00 to return at 13:30, he would continue working. At 15:15 the applicant would take his afternoon tea break when the rest of the workers were not taking any tea break and they continued working. He would come back from tea at 15:25.

[6] On the 23rd December 1996 the applicant was charged with the misconduct of not complying with an instruction. The instruction was that he should work in accordance with the amended hours of work as stipulated in Annexure C. He was found guilty as charged and given a final written warning. Thereafter he continued to work as he had done before, i.e. according to the hours of work stipulated in Annexure B and not according to the amended hours of work as stipulated in Annexure C. Again he was charged with misconduct of the same kind as in the first inquiry. Again he was found guilty. This time he was dismissed. This was on the 3rd January 1997. A subsequent internal appeal was unsuccessful. The applicant then challenged the fairness of his dismissal. The dismissal dispute was referred to the

Commission for Conciliation Mediation and Arbitration (the CCMA) for conciliation. After conciliation had failed, it was referred to arbitration before the second respondent. The latter found the dismissal to have been fair, and upheld it. It is the award handed down by the second respondent that the applicant moves this Court in these proceedings to review and

set aside. I now turn to consider the challenge of the second respondent's award.

Condonation, section 145 and section 158(1)(g):

- [7] The Act makes provision for reviews in two sections, namely, section 145 and section 158(1)(g). The grounds of review applicable in reviews brought under section 145 are much narrower than those applicable to reviews brought under section 158(1)(g) of the Act. Furthermore, section 145 requires that a review which is brought under it must be brought within six weeks of the service on the applicant of the arbitration award sought to be reviewed, whereas no specific time limit is expressly stipulated for reviews brought under section 158(1)(g), although it must be accepted that even those must be brought within a reasonable time. In his founding affidavit, the applicant said he was bringing this application under either section 145 and/or section 158(1)(g) of the Act. In this regard, he said, should the Court deal with the matter as a review under section 145, he was asking for condonation for filing this application outside the six-week period referred to in section 145. However, he said the matter also qualified to be dealt with under section 158(1)(g), under which it could not be said his application was filed out of time. As to the condonation application, Mr Van Niekerk, who appeared for the first respondent, informed the Court that he did not oppose the granting of condonation to the applicant.

1/1400 Having read the applicant's condonation application and, bearing in mind Mr Van Niekerk's stance on the issue of condonation, I am satisfied that, in so far as condonation may be required, this is a case where it should be granted, and it is so granted. Furthermore, although the first respondent adopted the attitude in its answering affidavit that this review could only be brought under section 145 and not under section 158(1)(g) and said this would be argued in court, this contention was not pursued during argument. The first respondent's argument was not presented on the basis that, in the light of the grounds of review relied upon by the applicant, it mattered whether the review was brought under section 145 or section 158(1)(g). Again I need say no more on this.

Grounds of review in this matter:

- [8] The issue before the second respondent was whether or not the applicant's dismissal by the first respondent on the 3rd January 1997 was unfair. To decide that issue, the second respondent *inter alia* had to consider the reason for the applicant's dismissal. As the reason for the applicant's dismissal was in effect that he had failed to comply with an instruction, the first question which the second respondent was required to decide was whether or not that instruction was a lawful/legal instruction. This is so because, in law, an employee is under no obligation to obey or comply with an unlawful/illegal instruction. If the second

1/1483 respondent found that the instruction which had been given was unlawful/illegal that would be the end of the inquiry, because the employee's conduct in disregarding an illegal/unlawful instruction would have been perfectly lawful.

[9] It is one of the applicant's complaints in this court that the instruction that was given to him was unlawful. For that reason the applicant contends that he was entitled to disregard the instruction. He says the second respondent's failure to make a finding to this effect was a gross irregularity, was grossly unreasonable and showed that the second respondent did not apply his mind to the matter or that he ignored relevant issues and took into account irrelevant issues. The applicant's basis for this contention is that the first respondent's instruction was in contravention of the provisions of section 7 of the Basic Conditions of Employment Act (The BCEA). That section provides as follows in so far as it is relevant to this matter:

"7. Meal intervals

- (1) No employer shall require or permit an employee -
 - (a) to work for more than five hours continuously without a meal interval of not less than one hour, or, where sub-section (2) has been applied, of not less than the agreed time;
 - (b) to perform any work during his meal

1/1625 interval.

- (2) An employer may conclude an agreement with his employee to shorten such employee's meal interval to not less than 30 minutes but such agreement shall not be of any force and effect unless the employer, excluding the employer of a domestic worker, has given written notice of such agreement to an inspector.
- (3) For the purposes of this Act -
 - (a) a period of work interrupted by an interval of less than one hour, or, in the case of a meal interval regulated by an agreement under sub-section (2) by an interval of less than the agreed time, shall be deemed to be uninterrupted."

[10] It is common cause that neither party drew the provisions of the BCEA to the attention of the second respondent. Indeed, the applicant himself says that he was not aware of the provisions of the BCEA at the time of his conduct complained of. He, nevertheless, contends that his ignorance of the relevant provisions of the BCEA at the time of his conduct is irrelevant to the question of the legality/lawfulness or otherwise of the instruction he disregarded. He says also that, although neither he nor his representative raised the issue of the provisions of the BCEA, the second respondent ought *mero motu* to have had regard to those provisions.

1/1800 Mr Van Niekerk did not argue that the second respondent should not have had regard to those provisions *mero motu*.

The second respondent's consideration of the legality/ lawfulness of the instruction.

[11] The second respondent did consider the issue whether the instruction was lawful. He came to the conclusion that it was a lawful/legal

instruction. In the course of dealing with the issue, the second respondent had referred to Le Roux and Van Niekerk: The South African Law of Unfair Dismissal (Juta 1994) and quoted them as, inter alia, saying the lawfulness or otherwise of an instruction which an employer gives to an employee, "is generally determined by reference to contract, statute or regulation ..." (page 7 of the arbitration award). At 7 of the award, the second respondent also emphasised that the substantive fairness

of the dismissal, "turns on the reasonableness and lawfulness of the instruction, under given circumstances". It seems that the second respondent's consideration of the legality/lawfulness of the instruction was only in relation to the basis advanced by the union as to why it contended that the instruction was unlawful. That basis was that the employer was obliged to have consulted the applicant's union before amending/readjusting hours of work and that, in the absence of such consultation, the instruction was unlawful. The second respondent rejected this

1/1767 basis. He concluded at page 8 of the award: "On the evidence, I am unable to find that the instruction given to (the applicant) to adhere to the rearranged working hours was unreasonable in the circumstances or unlawful in terms of collective agreements/statute ..." He went on to say he was satisfied that the instruction was, "... reasonable and lawful and that the (applicant's) refusal was sufficiently serious to warrant dismissal."

[12] From the manner in which the second respondent dealt with the question of the legality of the instruction, it is quite clear that the second respondent must have been unaware of the provisions of section 7 of the BCEA because, had he been aware of them, he would, in all probability, have dealt with their bearing on the lawfulness or otherwise of the instruction.

[13] Mr Van Niekerk argued that there was no causal connection between the illegality arising out of the contravention of section 7 of the BCEA and the agreement which was concluded between the first respondent and the majority of the workers to rearrange working hours. He emphasised that the illegality was already there even before the matter of a possible readjustment of working hours was raised. Mr Van Niekerk emphasised that the illegality related to the meal interval because, on any basis, the meal interval of 30 minutes was too short -in the absence of compliance with section

1/1900 7(2) of the BCEA. It is vital that, in considering this submission made by Mr Van Niekerk, the Court remains alive to what the true issue is on this aspect of the matter. The real question at this stage of the matter is: was the instruction that the applicant disregarded lawful/legal? The lawfulness or otherwise of an instruction where an employee is charged with the misconduct of not obeying such instruction is an essential element of such a charge/misconduct.

Was the instruction legal/lawful?

[14] Reduced to its essence, the instruction whose legality/lawfulness needs to be determined is that at 12:00 the applicant took a lunch break and did not work until 12:30 despite having been required by the first respondent in terms of the amended hours to continue working until 13:00 like everyone else, and that at 15:15 he took a tea break and did not work until 15:25 despite the fact that, like everyone else, he was required by the first respondent to continue working. What the applicant had done before 12h00 which was not in accordance with the amended hours was that, having taken a tea break at 09:30 like everyone else, he resumed work at 09:40 while everyone else continued with the tea break to 09:50. That conduct on the part of the applicant could not possibly form the basis of any disciplinary action by the first respondent. In the light of this the determination of the legality/lawfulness of the instruction must depend

on whether or not the first respondent was entitled to instruct the applicant to work up to 13:00 on that day. This must be decided in the light of the fact that by 12h00 the applicant, having started work at 06:00, had worked for over five hours continuously without being allowed a meal interval such as is contemplated by section 7(1) read with (2) of the BCEA. In the light of the provisions of section 7(3) of the BCEA, the tea break did not interrupt the continuity of the applicant's hours of work since 06:00. The provisions of section 7(1) of the BCEA mean that an employee must be allowed to take a meal break at 11:00 at the latest if he/she had started working at 06:00. What is negotiable between an employer and an employee at that time can only be the duration of the meal break provided the minima stipulated in section 7(1) are observed. It follows from this that, in the absence of an exemption, the first respondent was absolutely prohibited by section 7(1) to require or instruct the applicant to work beyond 11:00 without having allowed him a meal break of one hour. It was never the first respondent's case that section 7(2) had, in the words of section 7(1), been applied. Indeed it was never the first respondent's case that there was any agreement which the inspector referred to in section 7(2) had been notified of in writing as required by section 7(2). In my view the first respondent's instruction or requirement that the applicant should continue working at 12:00 was illegal/unlawful in that it was hit by the

1/2050 provisions of section 7(1) of the BCEA. The instruction that applicant should continue working at 15:15 was, in my view, also illegal for the same reason as the 12:00 instruction. With regard to the 15:15 instruction neither the fact that the applicant had taken a break at 12:00 which complied with neither section 7(1) nor 7(2), nor the fact that he had worked from 12:30 to 15:15 gave the first respondent the right to instruct the applicant to continue working in circumstances where the first respondent was still in breach of section 7(1). For every minute after 11:00 that the first respondent required the applicant to work, its breach of section 7 continued. Until the first respondent remedied its breach by allowing the applicant to take a meal break such as is contemplated by section 7(1) read with section 7(2), it had no right to so instruct the applicant and such instruction was illegal.

[15] The fact that, in disregarding the instruction, the applicant did not take the point that the instruction was a contravention of section 7 of the BCEA is neither here nor there. By the same token the fact that, at the time, the applicant was unaware of the provisions of section 7 is irrelevant to the legality of the instruction. Indeed, legislation such as the BCEA was enacted for the benefit of those in the applicant's position - so that employers may not subject them to inhumane and absolutely unacceptable working conditions. Indeed,

/so important

1/2688 so important is this protection that workers may not even waive such protection nor may they agree to the contravention of such provisions in return for what they may believe is more in their interest than the provisions of the BCEA at any one time. There are only two ways in which an employer may escape the provisions of section 7(1). The one is if he is granted an exemption from such provisions. The second is if he reaches an agreement with the employee in terms of section 7(2), provided the inspector referred to in section 7(2) is notified of such agreement in writing because, if that is not done, even such agreement is of no force and effect. In this matter, as I have already indicated, the first respondent does not rely on either because none was applicable.

[16] In my view, the argument that there was no causal connection between the illegality and the agreement misses the point. The absence of a causal connection such as was referred to by Mr Van Niekerk, if it is to be accepted that there was no such causal connection, does not and cannot affect the legality of the instruction. The question whether the instruction was or was not legal is determined by having regard to the terms of the instruction as well as the provisions of section 7 to see whether its terms are in conflict with those provisions. To the question whether the instruction was legal, it cannot be an answer to say because of the lack of a causal connection, the instruction was

legal. But it can be said that because of the provisions of section 7, the instruction was illegal. I think this disposes of Mr Van Niekerk's causal connection argument.

[17] Mr Van Niekerk also submitted that the "agreement" in terms of which the first respondent amended the hours of work during the shut-down was not itself illegal. This is not factually correct. The amended hours of work which the applicant was required to observe appear in Annexure C to the applicant's founding affidavit as well as at the bottom of Annexure D to the first respondent's answering affidavit. In terms of those hours, the first respondent would require the applicant to work continuously for more than five hours without a meal interval contemplated in section 7(1). That was illegal. The fact that that had been the case before anyway does not and cannot legalise the so-called agreement; on the contrary the so-called agreement exacerbated the illegality. The very least

that can be said is that the instruction to work beyond 12:00 was as illegal on the day in question as it had always been before. Mr Van Niekerk also submitted that, unlike a contravention of other provisions of the BCEA, a contravention of section 7(1) is not visited with, as he put it, "incurable illegality". Again in my view this is besides the point. The question is simply whether or not the instruction to work beyond 12:00 was lawful or not. As I have said that instruction was quite plainly illegal.

[18] I have also considered what GOLDSTONE JA said in NUMSA and Others v MacSteel (Pty) Ltd 1992(13)ILJ 826(A) at 833C - G, as quoted in Chemical Workers Industrial Union v Boardman Brothers (Natal)(Pty) Ltd (1995) 16 ILJ 619 (LAC) at 625C - G. I do not think that what GOLDSTONE JA said there is of any assistance to the first respondent.

The second sentence from the end of that quotation reveals the context in which GOLDSTONE JA said what he said in that passage. In that sentence GOLDSTONE JA said: "In no way would the order sought from and granted by the Court a quo have compelled any employee of MacSteel to work in excess of the statutory maxima." In this case the first respondent's instruction meant that the applicant was required to work in excess of five hours continuously without such meal interval as is contemplated by section 7(1) read with (2) of the BCEA.

[19] In the light of what I have said above, it follows that I am of the view that the second respondent's finding that the instruction was lawful/legal was quite plainly erroneous and had no foundation in law. It probably was made because the second respondent had not had regard to the provisions of section 7. In my view it may well be that if the second respondent had been aware of the provisions of section 7 of the BCEA, he might have reached a different finding. It is unfortunate that the

second respondent had no regard to the provisions of the BCEA even though the passage from Le Roux and Van Niekerk which he quoted in his award told him that the legality of an instruction is determined inter alia by having regard to a statute. Indeed, both the applicant and the first respondent might have been aware of the provisions of section 7 of the BCEA if, pursuant to its obligation in terms of section 21 of the BCEA, the first respondent had kept on its premises summaries of the prescribed portions of the provisions of the BCEA.

Is the second respondent's decision reviewable?

[20] I have already found that the second respondent's finding that the instruction was a lawful instruction was erroneous. Had the second respondent found that the instruction was unlawful/illegal, he would have been driven only to one conclusion, namely that the dismissal was unfair for lack of a fair reason to dismiss. In concluding that the instruction was lawful, the second respondent made an error of law. This error of law led the second respondent to find that the applicant had had no good reason to disregard the instruction, and to the ultimate decision that his dismissal was fair. In my view, the second respondent could not possibly have made that error of law if he had been aware of the provisions of section 7 of the BCEA. The second respondent became aware, before finalising his award,

that, where the lawfulness of an instruction given to an employee is to be determined, this is done by reference to a contract/ statute/regulation (see the second respondent's quotation from Le Roux and Van Niekerk at page 7 of his award) and yet nothing appears *ex facie* his award which suggests that there is any statute which he made any effort to consult before deciding on the lawfulness or otherwise of the instruction despite the fact that he recognised the critical nature of a finding on the legality or otherwise of the instruction.

[21] In my view that the dispute between the applicant and the first respondent which led to the applicant's dismissal was about working hours is a fact which should have rung bells in the second respondent's mind and should have driven him to decide to consult the BCEA. I think it is fair to expect everyone appointed as a Commissioner under the Commission for Conciliation, Mediation and

Arbitration to at least be aware that there is a statute which lays down minimum hours of work and basic conditions of employment in this country in excess of which an employer to whom it applies may not compel an employee to work. The second respondent's failure to consult the BCEA and to have regard to the provisions of section 7 thereof led to him making the error of law that he made. In my view the second respondent's failure constituted such gross irregularity in the proceedings as would justify the setting aside of his award. The error of law was, without any doubt, a material and

fundamental one.

[22] The second respondent's finding that the instruction which the applicant disregarded was lawful/legal also means that the first

respondent was entitled to instruct the applicant to continue working way beyond the five hours referred to in section 7(1) of the BCEA without being given the meal interval referred to in section 7(1). That is simply not correct in law. As the giving of such an instruction by an employer is a criminal offence, the effect of the second respondent's finding would be to permit the commission of a criminal offence. I am of the opinion that not only did the second respondent not apply his mind to this (as, of course, he was unaware of section 7 of the BCEA) but also that, for a Commissioner under the CCMA or any arbitrator, for that matter, to make a finding which has such an effect or which has such implications, is not only a gross irregularity but also renders his finding contrary to public policy and it simply cannot be allowed to stand.

[23] I accept that not every error of law is capable of rendering a decision of an arbitrator reviewable; indeed, it is undesirable that that should be the case because not only would that undermine the advantages of arbitration which litigation lacks but also the system of the administration of justice would not be able to cope with the amount of work that would result if every error of law were to

render decisions of arbitrators or lower courts or tribunals reviewable. However, I am of the view that the error of law in this case falls within the ambit of errors of law which render decisions based thereon reviewable in our law.

[24] In *Hira and Another v Booysen and Another*, 1992 (4) SA 69 (A) the question arose as to when an error of law would render a decision reviewable. In that case a disciplinary tribunal (composed of a Magistrate) found the appellants, who were teachers in the public service, guilty of contravening certain statutory provisions

applicable to them. It was because of the wrong interpretation that the tribunal had attached to the relevant statutory provisions that it concluded that the employees were guilty. Had it adopted the correct interpretation, it is highly unlikely that it would have come to the conclusion that they were guilty of misconduct. Dealing with the question as to when an error of law will render a decision reviewable, CORBETT CJ said the following under points (3), (4) and

(5) at 93 of his judgment in *Hira*:

"(3) Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically, upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction

of the statute conferring the power of decision.

(4) Where the tribunal exercises powers or functions of a purely judicial nature as for example where it is merely required to decide whether or not a person's conduct falls within a defined and objectively ascertainable statutory criterion, then the Court will be slow to conclude that the tribunal is intended to have exclusive jurisdiction to decide all questions, including the meaning to be attached to the statutory criterion, and that a misinterpretation of the statutory criterion will not render the decision assailable by way of common-law review. In a particular case it may appear that the tribunal was intended to have such exclusive jurisdiction, but then the legislative intent must be clear.

(5) Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (ie where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned), renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify

decision even on a correct interpretation of the statutory criterion, then normally (ie in the absence of some other review ground) there would be no ground for interference. Aliter, if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In this latter type of case it may justifiably be said that, by reason of its error of law, the tribunal 'asked itself the wrong question', or 'applied the wrong test', or 'based its decision on some matter not prescribed for its decision', or 'failed to apply its mind to the relevant issues in accordance with the behests of the statute'; and that as a result its decision should be set aside on review."

[25] I understood Mr Van Niekerk to concede that there would be no basis for holding that the question of law which the second respondent decided erroneously is one which it can be said the Legislature intended the CCMA Commissioners to have exclusive jurisdiction to decide. In my view, that concession was properly made. At any rate, even if my understanding that Mr Van Niekerk made such a concession is mistaken, he definitely refrained from arguing that the second respondent had exclusive jurisdiction to decide that question of law.

Indeed, there would be no statutory basis to suggest that, as required by the last sentence in point (4) at 93 of CORBETT CJ's judgment in *Hira*, there is a clear legislative intent that the second respondent was intended to have such exclusive jurisdiction. In those circumstances,

I am of the view that the second respondent's error of law is reviewable.

[26] I think the second respondent's finding could also be reviewed and set aside on the ground that the second respondent failed to apply his mind to the provisions of section 7 of the BCEA or that he disregarded such provisions in circumstances where not only were such provisions relevant to the issue before him but also where, given their proper and correct role in a matter such as this, they were fatal to the employer's case that the instruction was lawful. In the light of the conclusion I have reached on the issue of the legality of the instruction, I consider it unnecessary to deal with various other grounds on which the applicant sought to have the second respondent's award set aside. I now turn to the issue of relief.

Relief:

[27] Where this Court sets aside an arbitration award pursuant to section 145 review proceedings, section 145(4) of the Labour Relations Act, ("The Act") gives this Court the power to determine the dispute in the manner it considers appropriate or to make any order it considers appropriate about the

procedures to be followed to determine the dispute. This would, it seems, include, obviously, remitting a matter such as this back to the second respondent for his decision in the light of the judgment of this Court. Although section 158(1)(g) does not expressly provide for a corresponding provision, the Court does nevertheless have such power as would the High Court under its common law review powers. In his Notice of Motion, the applicant has not asked that the matter be referred back to the second respondent or to any other Commissioner under the CCMA. He has asked that this Court, after setting the arbitration award aside, should itself order the first respondent to forthwith reinstate him in his former position on conditions not less favourable to him than those enjoyed by him at the time of his dismissal with retrospective effect to the date of his dismissal. In argument Mr Van Niekerk opposed this and argued that this matter should be remitted to the second respondent. He emphasised that disputes such as these are to be decided by arbitrators and this Court should play a supervisory role.

[28] Although in matters of review the norm is to refer a matter back to the lower tribunal for its reconsideration in the light of the judgment of the reviewing court, in certain cases the reviewing court is entitled not to remit the matter but to decide it itself. (See *Traub v Administrator of the Transvaal and Others* (1989) 10 ILJ 9(T) at D-H and the authorities referred to therein.) Where the end

result is a foregone conclusion and a reference back will merely waste time, this would be a strong factor which may justify the Court not remitting a matter to the lower tribunal. This factor, said COLMAN J in *Agricultural Supply Association (Pty) Ltd v Minister of Agriculture* 1970(4) SA 65(T) at 72 as quoted by GOLDSTONE J, as he then was, in *Traub*, assumes even greater importance where the delay would be prejudicial to the applicant.

[29] Having considered which of the two courses I should follow, I have come to the conclusion that this Court should not remit the matter but should decide it itself. I have arrived at this conclusion because, in my view, it would serve no useful purpose to remit the matter as the end result is, with respect, a foregone conclusion. To do so will simply cause an unnecessary delay in the resolution of the dispute between the parties - a delay which, it seems to me, will be prejudicial to both the applicant and the first respondent. My finding that the instruction which the applicant disregarded was illegal means that, if the matter were referred back to the CCMA or the second respondent, the issue of whether the dismissal had a fair reason or not would not be reconsidered nor would the question whether the dismissal was procedurally unfair. The former would not be reconsidered because I have already decided it. The latter falls away once it has been found that the dismissal was substantively unfair.

[30] The only question that the second respondent would be left with to consider would be the question of

relief. In respect of relief I have already said that in his Notice of Motion the applicant seeks reinstatement retrospective to the date of his dismissal. The first respondent did not suggest in its answering affidavits that reinstatement would be inappropriate nor did it place before the Court anything to suggest that, if the Court concluded that the second respondent's award should be set aside, it would be inappropriate for the Court to itself grant the order of reinstatement which it was aware the applicant was seeking as per the Notice of Motion. I have also had regard to the evidence which was before the second respondent. Except for a bald and unsubstantiated contention by the first respondent in those proceedings that "due to [the applicant's] actions, the trust in the employment relationship had been damaged and that re-employment would be intolerable, which was not pursued in this Court also there the first respondent does not appear to have placed any evidence that would have stood in the way of the granting of reinstatement.

[31] All this must be viewed against the provisions of section 193(2) of the Act which have elevated reinstatement to a position where it is a primary remedy. The first respondent has twice had an opportunity to place such evidence to suggest that reinstatement would be inappropriate as it may have had and twice it placed none. In my view this can only be

because no such evidence exists. For that reason none is likely to be placed before the second respondent if the matter were remitted to him. But at any rate it would be unfair to the applicant to

refer the matter back to the second respondent only for the purpose of granting the first respondent another opportunity to place such evidence when it has not availed itself of two opportunities to do so

- especially the one before this Court when it knew that the relief being sought by the applicant did not include a referral of the matter back to the second respondent but, on the contrary, included an order by this Court itself reinstating the applicant.

[32] With regard to costs it seems to me that it would accord with both the requirements of law and fairness if the costs were awarded to the applicant.

[33] In the result, the order I make is the following:

- (1) The second respondent's arbitration award of 21 May 1997 handed down in the case between the applicant and the first respondent under CCMA case No KN2182 is hereby reviewed and set aside.
- (2) The first respondent is ordered to immediately reinstate the applicant in his former position in its employ on terms and conditions no less favourable to him than those which governed his employment immediately prior to his dismissal on 3rd January 1997.
- (3) The order in (2) above shall operate with retrospective effect from the 3rd January 1997 (i.e. the date of the applicant's dismissal).
- (4) The order in (3) above shall not entitle the applicant to the payment of wages for a period in respect of which he was paid notice pay by the first respondent.
- (5) The first respondent is to pay the applicant's costs.

R M M ZONDO,

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

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